Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

JONATHAN R. WALLS, Warden,

Petitioner,

vs.

DEMETRIUS HENDERSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Must a reviewing court perform a "comparative juror analysis" of the selected and excluded jurors before determining whether the trial court's finding of no *prima facie* case of discrimination was correct, even though no characteristics of any jurors were presented at the original *Batson* hearing and is a failure to perform a "comparative juror analysis" contrary to clearly established federal law by this Court?

Can the Seventh Circuit Court of Appeals ignore well-founded notions of comity and federalism by ordering the Illinois Courts to conduct a *Batson* hearing even though it failed to find any constitutional violations which resulted in Henderson's custody?

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OPINIONS BELOW

Petitioner Jonathan R. Walls respectfully petitions for a writ of certiorari to review the July 9, 2002 decision of the United States Court of Appeals for the Seventh Circuit, published at 296 F.3d 541 (7th Cir. 2002), and reprinted in the appendix to this petition. The judgment affirmed the granting of a petition for writ of habeas corpus challenging Henderson's conviction and death sentence for the murder, aggravated kidnapping, aggravated criminal sexual assault and armed violence of 16-year-old Kimberly Boyd. Petitioner's Petition for Rehearing or, in the alternative, Petition for Rehearing En Banc, was denied on August 22, 2002. (Pet. App. E at App. 251). Thereafter, petitioner requested a stay of the mandate pending the filing of a Petition for Writ of Certiorari in this Honorable Court. On September 6, 2002, the Seventh Circuit Court of Appeals denied petitioner's request for a stay. Petitioner then filed an Application for Stay of the Seventh Circuit's Order Denying the Stay of Mandate which Justice Stevens granted on November 1, 2002.

On February 8, 1997, Henderson filed in the District Court of the Northern District of Illinois a Petition for Writ of Habeas Corpus. The District Court granted the petition on September 29, 2000 (2000 U.S. Dist. LEXIS 14540), reprinted in the appendix to this petition. The decision of the Illinois Supreme Court affirming Henderson's convictions and death sentence, filed on November 30, 1990, is published at 142 Ill. 2d 258, 568 N.E.2d 1234 (1990) and is also reprinted in the appendix to this petition. (Pet. App. D at App. 162).

STATEMENT OF JURISDICTION

The Court of Appeals for the Seventh Circuit issued its opinion on July 9, 2002. The Petition for Rehearing, or in the Alternative, Petition for Rehearing En Banc, was denied on August 22, 2002. On September 6, 2002, the Seventh Circuit denied a stay of the mandate. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, section 1254(1) and Rule 10 of the Rules of the Supreme Court of the United States.

CONSTITUTION AND STATUTE INVOLVED

United States Constitution, amend. XIV.

No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA) 28 U.S.C. §2254 et seq.

STATEMENT OF THE CASE

The Trial

In the early morning hours of July 13, 1986, the brutally murdered body of Kimberly Boyd was discovered in an alley behind 6039 S. Carpenter Street in Chicago. She had over 40 stab wounds to the head, face, neck, hands, abdomen, back and buttocks. Some of the stab wounds were so deep that according to the medical examiner, Dr. Mitre Kalekar, the wounds must have been "plunged all the way up to the hilt." Kimberly also suffered

numerous bruises, a broken right thigh bone and several fractured ribs. Additionally, portions of her right hip had experienced "skin slippage," or blister formations, which could have been caused by being dragged or hit by a car. The cause of her death was multiple stab wounds.

On July 17, 1986, Henderson was arrested at his home in Tinley Park for the murder of Kimberly Boyd after his name had come up during a conversation with one of the investigating detectives. Following his arrest, he was transported to Area 3 Violent Crimes police station where he gave an assistant state's attorney a fifteen page court-reported statement in which he admitted that he, Curtis Croft, Kevin Campbell and Alonzo Woodard gang raped Kimberly Boyd during a party which was held at Curtis Croft's house. Henderson said he became angry with Kimberly because he believed she was cheating on Anthony by having sex with Anthony's brother, Alonzo. Kimberly then, according to Henderson, answered with a "smart remark" so he hit her on the head with a roll of wallpaper. Henderson then said that Kimberly removed her pants and he called Alonzo Woodard, Croft and Campbell into the room. After the four engaged in what Henderson described as various sexual acts over an extended period of time, Henderson told the others that they would have to kill her because they had raped her and he was "not going to spend no time in jail for a bitch." Henderson, Croft and Campbell then placed the victim, blindfolded, in the trunk of Henderson's car and drove off, with Campbell and the Woodard brothers following in a car behind them. Henderson said he drove toward the victim's house but purposely lost the other car in traffic so that they "couldn't be around when we had to kill the girl." After that, Henderson drove to an alley off Carpenter street in Chicago

where Henderson and Croft opened the trunk of the car. The victim pleaded for her life, but Henderson stabbed her two times in the throat. The two then removed Kimberly from the trunk, placed her on the ground, and Henderson stabbed her in the chest. Although Kimberly continued to plead, Croft said "f___, she still ain't dead," and grabbed the knife and stabbed her in the head. Henderson said he then "got nervous" and told Croft that he "knew if she lived we're goin' to get caught. So we might as well finish her off." Henderson then "finished her off" by stabbing her in the buttocks, the leg and the stomach. After stabbing her more than 40 times throughout her body, they decided to run over her with the car. Henderson said he "would take responsibility for the car" and then drove the car over her legs and waist area. Henderson then backed up to the end of the alley and drove over her mid-section, at which time Croft said "f___ that man, let me drive. She still ain't dead." Henderson then, for the third time, drove over her, but this time slower than before in order to ensure that she was dead.

Wendy Herron, Curtis Croft's girlfriend and mother of their infant child, testified that Henderson, Croft, the Woodard brothers, Kevin Campbell, the victim and some other people were drinking at Croft's house on the night of the murder. She further stated that while she was at Croft's house, she peered under a door to a room where she saw Henderson's and Kimberly's feet "moving around, they never stood still." Anthony Woodard, co-defendant Alonzo's brother, testified as to the events at the house during the gang rape. His testimony varied from Henderson's primarily by claiming that his brother and Campbell were forced by Henderson to engage in sexual acts with the victim, rather than voluntarily participating. The forensic

evidence as testified to by Dr. Miltre Kalekar, deputy medical examiner, corroborated Henderson's statement regarding the location of the stab wounds in the victim's head, neck, chest, hands, back and buttocks. She further stated that some of the victim's wounds were consistent with being run over and dragged by a car. Henderson's grandmother and mother testified as alibi witnesses for Henderson and stated that on the night of the murder, they were at the apartment where Henderson lived with his mother. At approximately 3:00 or 3:30 a.m., Henderson arrived at the apartment without any blood on his person. His mother remembered the time he came home that night because she was "furious with him staying out so late."

At the conclusion of evidence and argument, the jury found Henderson guilty of murder, aggravated criminal sexual assault, and aggravated kidnapping. After the trial court found Henderson eligible for the death penalty, the parties presented evidence in aggravation and mitigation. Following the sentencing hearing, the trial court found that Henderson is a "cold and calculating and uncaring individual who has taken this life with planning," and that he believed that Henderson was a person that could not be rehabilitated as he had "exhibited all those things that society finds repugnant in people." Although "explanations" had been presented for Henderson's brutal crimes, such explanations, according to the court, showed that Henderson had no remorse and that through his life he had exhibited extreme violence and cruelty against women. Henderson was then sentenced to death.

Jury Selection

Following the selection of a fourteen-member jury panel from a venire consisting of 40 people, the defense moved for a mistrial based on its claim that the prosecution had systematically excluded black venire members from the jury by using six of its ten challenges against blacks. (Both the prosecution and defense had been allotted fourteen challenges; the prosecution used ten and the defense used thirteen). The defense further noted that the chosen jury consisted of four white males, six white females and two black females, and the two alternate jurors were a black male and a white female. The trial judge reserved ruling on the motion until the morning of the next day at which time one of the six female jurors told the judge that she could not concentrate on the trial due to personal problems. After consulting with both counsels, the female juror was excused and the first alternate, the black male, then became a juror, resulting in three black jurors remaining on the jury.

The trial court then announced his ruling on the *Batson* motion, stating that he believed the prosecution had not systematically excluded blacks from the jury and that no explanations would be necessary for the prosecution's challenges, thereby implicitly finding that defendant had not made a *prima facie* case of purposeful discrimination as required by *Batson*.

REASONS FOR GRANTING THE WRIT

1. The Seventh Circuit Court of Appeals failed to follow this Court's holding in *Batson v. Kentucky*, 476 U.S. 79 (1986) and completely ignored the AEDPA when it declared that Henderson's state reviewing court should have performed a "comparative juror analysis" of the selected and excluded jurors before determining whether the trial court's finding of no *prima facie* case of discrimination was correct, even though Henderson failed to present or argue any characteristics of any jurors at the original *Batson* hearing and where *Batson* and its progeny does not require any such comparative analysis at the *prima facie* stage, or any stage, of the *Batson* inquiry.

2. The Seventh Circuit Court of Appeals ignored well-founded notions of comity and federalism when it awarded the habeas petitioner relief and expressly ordered the Illinois Courts to conduct a *Batson* hearing even though it failed to find any constitutional violations which resulted in Henderson's custody.

ARGUMENT

I. THE SEVENTH CIRCUIT COURT OF APPEALS COMPLETELY IGNORED THE AEDPA AND FAILED TO FOLLOW THIS COURT'S HOLDING IN *BATSON V. KENTUCKY* WHEN IT DECLARED THAT HENDERSON'S STATE REVIEWING COURT SHOULD HAVE PERFORMED A "COMPARATIVE JUROR ANALYSIS" OF THE SELECTED AND EXCLUDED JURORS BEFORE DETERMINING WHETHER THE TRIAL COURT'S FINDING OF NO *PRIMA FACIE* CASE OF DISCRIMINATION WAS CORRECT, EVEN THOUGH HENDERSON FAILED TO PRESENT OR ARGUE ANY CHARACTERISTICS OF ANY JURORS AT THE ORIGINAL *BATSON* HEARING AND WHERE *BATSON* AND ITS PROGENY DO NOT REQUIRE ANY SUCH COMPARATIVE ANALYSIS AT THE *PRIMA FACIE* STAGE, OR ANY STAGE, OF THE BATSON INQUIRY.

Relying on its own erroneous, pre-AEDPA precedent,[1] the Seventh Circuit Court of Appeals incorrectly held in this post-AEDPA case that Demetrius Henderson was entitled to habeas corpus relief because the Illinois Supreme Court failed, pursuant to *Batson v. Kentucky*, to perform a "comparative juror analysis" of the excluded and selected jurors at the *prima facie* stage, even though a) the record proves that "comparative analysis" evidence was never presented by the defense to the trial court and was only argued in Henderson's appellate brief; and b) this

[1] *Mahaffey v. Page*, 162 F.3d 481 (7th Cir. 1998) (comparative analysis required by court at third-stage).

Honorable Court has never ruled on the role of "comparative analysis" at **any** stage, let alone the first stage, of the *Batson* inquiry. By granting Henderson habeas relief in the form of a new *Batson* hearing, the Seventh Circuit has clearly defied this Court's precedent by attempting to create its own "*Batson* formula," (precisely what this Court **declined** to do in *Batson*), and ignored the AEDPA requirements when it held that a "comparative juror analysis" should have been performed herein by the state **reviewing** court.

A. THE ILLINOIS SUPREME COURT PROPERLY FOUND THAT THE RELEVANT CIRCUMSTANCES OF RECORD DID NOT RAISE AN INFERENCE OF PURPOSEFUL DISCRIMINATION PURSUANT TO *BATSON*.

The Seventh Circuit Court of Appeals followed a tormented path of logic to arrive at its conclusion that the Illinois Supreme Court failed to perform a "comparative juror analysis" when reviewing the trial court's finding that no *prima facie* case of racial discrimination had been established by Henderson. The Illinois Supreme Court's decision itself proves that the Seventh Circuit was entirely wrong, where the state high court was certainly mindful of its role pursuant to this Court's decision in *Batson*. The Illinois Supreme Court acknowledged that to establish a *Batson* claim, a defendant has to first establish a *prima facie* case by showing that he is a member of a cognizable racial group and that the prosecution exercised peremptory challenges to exclude from the jury venire members who share his race, and by pointing to any other relevant circumstances that raise an inference of purposeful discrimination by the prosecution. *People v. Henderson*, 142 Ill. 2d 258, 275, 568 N.E.2d 1234 (1990) (Pet. App. 179).

The state high court, relying on this Court's previous opinions and certain relevant circumstances which, over the years, have been developed by the Illinois Supreme Court and various other state and federal courts, then examined, based on the record before it: 1) whether a disproportionate number of strikes against blacks had been made to present a "pattern;" 2) the level of black representation on the jury as compared to the venire; 3) whether the stricken black venire members were heterogeneous in every respect except race; 4) the prosecutor's questions during *voire dire* and statements when exercising challenges; and 5) the race of the defendant, victim, and witnesses. The Illinois Supreme Court determined that, based upon the foregoing relevant circumstances, there was no inference of purposeful discrimination, no *prima facie* case had been established and the trial court's ruling was not against the manifest weight of the evidence. *Henderson*, 142 Ill. 2d at 289.

The Illinois Supreme Court also considered the fact that on Henderson's jury of 14 people, where three were African-American, the level of African-American representation was 21%, although the level of black representation on the entire venire was 30%. The state high court found that this "slight" disparity provided "some" support for an inference of discrimination, but concluded that because out of "all the relevant factors, only two tend[ed] slightly to suggest purposeful discrimination, while the others [were] either neutral or tend[ed] to refute such a suggestion," it could not hold that the trial court's ruling was against the manifest weight of the evidence. *Henderson*, 142 Ill. 2d at 290-91. The only relevant factor which strongly suggested purposeful discrimination, according the state high court, was the disproportionality of the prosecution's challenges to black as opposed to non-black venire members where six

of the prosecution's ten challenges were used against blacks. However, at the same time, the state court determined that "this disproportionality is not so severe that it creates a 'pattern.'" *Henderson*, 142 Ill. 2d at 288.

Finally, the state high court also considered the heterogeneity of the stricken blacks which the court found to be a "neutral factor" in this case. *Henderson*, 142 Ill. 2d at 289. The court's review of the record found that

> five of the six were nondiverse in respects other than race. Five of the six were single and had a college education; three of these five lived alone, and the other two lived with immediate family. The sixth stricken black venire member was separated from her husband, had three daughters ranging in age from 22 to 30, apparently lived alone, and was unemployed, as were two of her three daughters. While these six venire members did not share identical backgrounds, and while it is true that the prosecution accepted white venire members who were single and lived alone, at this stage of a *Batson claim we are only concerned with whether the stricken black venire members shared any characteristics other than race; it is not our role to search for possible reasons for the prosecution's strikes or for similarities between stricken black and accepted white venire members. Henderson*, 142 Ill. 2d at 290 (emphasis added). (Pet. App. 181).

Thereafter, the state high court determined that the trial court's finding that Henderson had failed to establish a *prima facie* case of purposeful discrimination was not against the manifest weight of the evidence. *Id.*

B. THE SEVENTH CIRCUIT COMPLETELY IGNORED THE REQUIREMENTS OF THE AEDPA WHEN IT HELD THAT THE STATE HIGH COURT'S DECISION WAS AN UNREASONABLE APPLICATION OF *BATSON*.

The Seventh Circuit Court of Appeals clearly ignored the mandate of the AEDPA when it held that the Illinois Supreme Court's ruling was an "unreasonable application of Batson." *Henderson v. Walls*, 296 F.3d at 550. As this Honorable Court is fully cognizant, 28 U.S.C. §2254(d)(1) provides that an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision (1) that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by this Court, or (2) that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. According to this Court, a state court decision involves an "unreasonable application" of Supreme Court precedent when the state court unreasonably refuses to extend a legal principle to a new context where it should apply. *Williams v. Taylor*, 529 U.S. 362, 407 (2000). Federal habeas relief is warranted only when the refusal was "objectively unreasonable," not when it was merely erroneous or incorrect. *Williams*, 529 U.S. at 410-411. Federal law as determined by this Court refers to "the holdings, as opposed to the dicta of the Court's decision as of the time of the relevant state court decision." *Williams v. Taylor*, 529 U.S. 362, 412. (2000).

Here, the law articulated by this Court for purposes of the instant case is, of course, *Batson v. Kentucky*, and, as stated previously herein, the trial court was required to determine whether Henderson had established a *prima facie* case by, in part, pointing to "any other relevant circumstances that raise an inference of purposeful discrimination by the prosecution." *Batson*, 476 U.S. at 96. Although this Court requires that an "inference" of purposeful discrimination must be established, nowhere in *Batson* did this Court ever define the term "inference" or impose a formula for "inference." In fact, this Court acknowledged the numerous jury practices followed in state and federal courts, stating that it would refrain from instructing the lower courts on how to apply its holding in *Batson* and that it declined an "attempt to instruct [state and federal trial courts] how best to implement [its] holding. . . . " *Batson*, 476 U.S. at 99-100 n.24.

Ignoring that statement, the Seventh Circuit has done exactly what this Court declined to do in *Batson* – instruct a state court on how to implement this Court's decision in *Batson* and its progeny through the use of a formula. Neither *Batson v. Kentucky*, nor any other decision from this Court, requires any court, let alone an appellate court, to make a "comparative juror analysis" before determining whether a party has established a *prima facie* case of discrimination. In fact, no case from any Circuit, other than the Seventh Circuit, has ever held that a "comparative juror analysis" is required at the *prima facie* stage since, to do so, would obviously result in a collapsing of the three-step *Batson* framework where the pretextual

analysis, or third-stage inquiry, would now dissipate into the first stage, or *prima facie* inquiry.[2] The mere presentation of "comparison" evidence at the appellate level to attempt to prove a *prima facie* case of discrimination cannot trigger habeas relief, especially where a "comparative juror analysis" has never been required, let alone addressed, by this Court for a first-stage (or even a third-stage) *Batson* inquiry.[3] Thus, the Illinois Supreme Court's refusal to employ comparative analysis cannot be an unreasonable application of this Court's precedent pursuant to the mandate of the AEDPA.

Clearly discounting this Court's confidence in trial judges, judges who are "able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a *prima facie* case of discrimination" (*Batson*, 476 U.S. at 98), the Seventh Circuit, instead, believed that

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[2] It does appear as if one circuit erroneously believed that *Batson* mentioned a "comparative analysis" at the *prima facie* stage. *See*, *United States v. Allison*, 908 F.2d 1531, 1537 (11th Cir. 1990). However, the opinion in *Allison* is in error for at least two reasons: first, it relied on *United States v. Young-Bey*, 893 F.2d 178 (8th Cir. 1990) to support its statement that "the fact that white persons were chosen for the petit jury who seemed to have the same qualities as stricken black venirepersons[ ]" was a circumstance which a defendant must identify at the *prima facie* stage when *Young-Bey* did not stand for that proposition; second, *Allison* cited to *Young-Bey* which it claimed, in turn, cited to *Batson* at pages 96 and 97, however that quoted language from *Allison* appears nowhere in this Court's *Batson* opinion.

[3] In fact, this Court has not yet ruled on the role of comparative analysis on appellate review for any stage of the *Batson* inquiry. *See*, *People v. Dunn*, 40 Cal. App. 4th 1039, 1050 (3rd Dist. 1995); *see, also*, *People v. Johnson*, 47 Cal. 3d 1194, 1220-1221 (1989) (commenting on the use of "comparative juror analysis" at the third stage and that such analysis "fail[s] to recognize the practical considerations . . . which make a comparative juror analysis unworkable on review)."

because it could "find nothing in *Batson* that entitles a state court to exclude from the *prima facie* case an entire category of evidence that has the potential to throw light on the question of intentional discrimination," *Henderson v. Walls*, 296 F.3d at 548, the state high court's decision was wrong. Certainly, the Seventh Circuit's inability to find precedent in this Honorable Court's opinion in *Batson* cannot result in the state high court's decision being unreasonable under the AEDPA. In fact, the state high court's decision cannot be disturbed, pursuant to the AEDPA, even if the Seventh Circuit may have believed that "certain things could have been handled better by the state trial judge . . . or by the reviewing court[.]" *Sanchez v. Gilmore*, 189 F.3d 619, 623 (7th Cir. 1999). Undeniably, the Seventh Circuit "can find nothing in *Batson*" to support its decision because there is nothing in *Batson* to support its decision; there is no "clearly established precedent," nor can there be "an unreasonable application of *Batson*," under the AEDPA to support the basis of the Seventh Circuit's reversal.

C. THE SEVENTH CIRCUIT IGNORED THE STANDARD OF REVIEW WHEN IT ERRONEOUSLY BELIEVED THAT THE ILLINOIS SUPREME COURT WAS A FACT-FINDER, RATHER THAN A REVIEWING COURT, WHEN THE ILLINOIS SUPREME COURT FOUND THE TRIAL COURT'S RULING ON *BATSON* TO NOT BE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Not only has the Seventh Circuit Court of Appeals ignored the mandate of the AEDPA, it has also entirely disregarded the standard of review and this Court's clear

precedent. Even though the record proves that the Illinois Supreme Court believed, as a reviewing court, that it followed the mandate of *Batson* in its review of the trial court's finding and that it was not their role, as a reviewing court, "to search for possible reasons for the prosecution's strikes or for similarities between stricken black and accepted white venire members," the Seventh Circuit mistakenly believed that it was. Apparently, because Henderson, for the first time, included in his state appellate brief a "comparative analysis" argument as to the excluded and selected jurors, the Seventh Circuit found that "evidence of this type is indisputably part of the 'relevant circumstances' that Batson requires a state court to consider at the *prima facie* stage," and determined that the state high court's rejection of this "relevant" evidence was an "unreasonable application of Batson." *Henderson v. Walls*, 296 F.3d 541, 550 (7th Cir. 2002). (Pet. App. 1 at 15).

It is petitioner's contention that the Seventh Circuit erroneously placed the Illinois Supreme Court in a position of "fact-finder," where, clearly, it was not. When a *Batson* issue arises, the trial judge acts as the finder of fact. It is not proper for an appellate court to rely upon information that was not admitted at the *Batson* hearing in the trial court.[4] To allow, or, in this case, to force, an

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[4] Justice Maloney said it best in his dissenting opinion in *Young v. State*, 856 S.W.2d 175 (Tex. 1993), wherein that defendant was attempting to prove racial discrimination in the prosecutor's peremptory challenges, albeit at the third stage of a *Batson* hearing, when he wrote that "[a]llowing disparity to be raised for the first time on appeal without the trial judge having had the benefit of submission of that issue and ruling on it is tantamount to a sandbag of the greatest magnitude."

appellate court to rely upon information that was not admitted as evidence at trial undermines the standard of review for a *Batson* issue which, according to this Court, gives great deference to the trial court whose role it is to evaluate the credibility of the prosecutor and to consider "all relevant circumstances" in determining whether a *prima facie* case of racial discrimination has been established. *Batson v. Kentucky*, 476 U.S. 79, 96-98, n.21 (1986). It is the trial judge, *not* a reviewing court, who looks at certain factors which "might give rise to an inference of discrimination" such as this Court's two nonexhaustive examples of how the moving party could establish a *prima facie* case by showing "a pattern of strikes against black jurors included in the particular venire," or "the prosecutor's questions and statements during voir dire examination." *Batson*, 476 U.S. at 96-97. However, as this Court cautioned, these "examples are merely illustrative" and it had "confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a *prima facie* case of discrimination against black jurors." *Batson*, 476 U.S. at 95.

Obviously ignoring what was made clear by this Court, the Seventh Circuit narrow-mindedly seized on this Court's use of the word "all" when erroneously determining that the state high court failed to consider "all" relevant circumstances at the *prima facie* stage by failing to perform a "comparative juror analysis." *Henderson v. Walls*, 296 F.3d at 548. The Seventh Circuit misconstrued this Court's precedent where it is clear that this Court's use of the word "all," in the context of "all relevant circumstances" to be considered in a *prima facie* inquiry, referred to the **trial court**, as fact-finder, considering "all" such

circumstances, and **not** a reviewing court. Despite the fact that the Seventh Circuit Court of Appeals found that Henderson "vehemently requested a comparison analysis and provided the court with all of the relevant characteristics of the excluded and accepted venire members[,]" *Henderson v. Walls*, 296 F.3d at 549, those comparisons were ***never*** presented to the trial court, only the reviewing court. Thus, they were not part of "all" the relevant circumstances considered by the trial judge and, therefore, were properly ***not*** considered by the state high court in its review. A reviewing court's role is to **review** that which was previously presented at trial and, for that very reason, the Illinois Supreme Court stated that "it is not our role to search for possible reasons for the prosecution's strikes or for similarities between stricken black and accepted white venire members." *Henderson*, 568 N.E.2d at 1250. Such statement is supported by this Court's opinion in *Batson* and is completely misinterpreted by the Seventh Circuit Court of Appeals. The Seventh Circuit has clearly ignored the standard of review required in this case, as well as this Court's clear pronouncement regarding the trial judge's role in determining whether a *prima facie* case was established.

The fact that the Illinois Supreme Court was reviewing the trial court's determination pursuant to *Batson*, and not acting as a fact-finder to replace it, cannot be emphasized enough. For the Seventh Circuit to say that, "[t]his case is about an erroneous exclusion of proffered testimony that meets the relevance standard," *Henderson v. Walls*, 296 F.3d at 550, is to say that it is completely discounting the proper role that a reviewing court plays, under the law, as well as this Honorable Court's opinion in *Batson*. This Honorable Court has never stated, in *Batson* or its

progeny, that a court, reviewing or otherwise, is to perform a "comparative analysis" at the first, (or even third) stage of the *Batson* inquiry, especially when no comparative "evidence" was presented to the trial court, but was only presented in an appellate brief. The Seventh Circuit's opinion ignores this Court's precedent, as well as the AEDPA, and is clearly in error. Certiorari must be granted to remedy the Seventh Circuit's grievous error and, if this Honorable Court so chooses, to rule on the role of "comparative juror analysis" on appellate review.

II. THE SEVENTH CIRCUIT COURT OF APPEALS IGNORED WELL-FOUNDED NOTIONS OF COMITY AND FEDERALISM WHEN IT AWARDED THE HABEAS PETITIONER RELIEF AND EXPRESSLY ORDERED THE ILLINOIS COURTS TO CONDUCT A *BATSON* HEARING EVEN THOUGH IT FAILED TO FIND ANY CONSTITUTIONAL VIOLATIONS WHICH RESULTED IN HENDERSON'S CUSTODY.

It is beyond dispute that a federal court reviewing a habeas petitioner's claims that he is in custody in violation of the Constitution is limited to reviewing precisely that, the constitutionality of the petitioner's *custody*. As this Honorable Court explained in *Coleman v. Thompson*:

> When this Court reviews a state court decision on direct review pursuant to 28 U.S.C. §1257, it is reviewing the *judgment*; if resolution of a federal question cannot affect the judgment, there is nothing for the Court to do. This is not the case in habeas. When a federal district court reviews a state prisoner's habeas corpus petition pursuant to 28 U.S.C. §2254, it must decide whether the petitioner is "in custody in violation of the

> Constitution or laws or treaties of the United States." *Ibid.* **The court does not review a judgment, but the lawfulness of the petitioner's custody *simpliciter*.** *See Fay v. Noia*, 372 U.S. 391, 430, 83 S. Ct. 822, 844 (1963).

501 U.S. 722, 730 (1991) (italicized emphasis in original) (bold emphasis added).

This limitation on federal courts' reviewing authority is premised upon notions of comity and federalism. As the Court has repeatedly stated, reasonable restrictions on the availability of habeas relief are necessary to promote respect for the independence of the state courts as well as to protect the state's sovereignty over criminal matters. *See Coleman*, 501 U.S. at 730 (stating that "the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism"), *Brecht v. Abrahamson*, 507 U.S. 619, 635-36 (1993) (holding that considerations of comity and federalism require that federal courts reviewing habeas petitions deem errors harmless unless the petitioner can show the error "had substantial and injurious effect or influence in determining the jury's verdict"), *O'Sullivan v. Boerckel*, 526 U.S. 838, 844 (1999) (explaining that "[c]omity . . . dictates that when a prisoner alleges that his continued confinement for a state court conviction violates federal law, the state courts should have the first opportunity to review this claim and provide any necessary relief") and *Teague v. Lane*, 489 U.S. 288, 308 (1989) (holding that interests of comity and finality demonstrate that new constitutional rules of criminal procedure are not applicable to cases which became final prior to the announcement of the new rule).

In the instant case, the Seventh Circuit Court of Appeals determined that habeas relief was warranted because the procedure employed by the Illinois Supreme Court in reviewing Henderson's *Batson* claim was deficient. However, in reaching this conclusion, the court neither found that the prosecution engaged in racial discrimination during jury selection, nor that the record demonstrated that Henderson had satisfied his burden of establishing a *prima facie* case of racial discrimination. **In the absence of either of these findings or any other finding linking the state court's analysis to the propriety of Henderson's custody**, it is clear that Henderson is **not** "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §2254(a).

Clear evidence that §2254 requires a direct link between a state court's judgment and a petitioner's custody can be found in this Honorable Court's decision in *Stone v. Powell*, 428 U.S. 465 (1976). In *Stone*, the Court held that federal courts may not issue writs of habeas corpus based upon Fourth Amendment violations if the state courts provided the opportunity for a full and fair hearing on the Fourth Amendment claim, but failed to properly exclude the evidence as required by the exclusionary rule. *Id.* at 482. The Court explained that "[t]he primary justification for the exclusionary rule . . . is the deterrence of police conduct that violates Fourth Amendment rights" and that "the rule is not a personal constitutional right". *Id.* at 486. Thus, under *Stone*, even if a seizure violated the Constitution, habeas relief is not

available because there is an insufficient connection between the state court's ruling and the ultimate question regarding the validity of the petitioner's custody.[5]

Moreover, by holding that the Illinois Supreme Court's review of Henderson's claim was insufficient and remanding the matter back to the state courts so the contention can be considered properly, the Seventh Circuit Court of Appeals has effectively turned itself into a superior reviewing court over the state high court. However, the Illinois state courts are both equal in stature to, and independent of, the lower federal courts.

As this Honorable Court explained in *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*:

> While the lower federal courts were given certain powers in the 1789 Act, they were not given any power to review directly cases from state courts, and they have not been given such powers since that time. Only the Supreme Court was authorized to review on direct appeal the decisions of

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[5] Although the full and fair hearing doctrine of *Stone v. Powell* has thus far not been extended to claims under *Batson*, it is clear that the *Batson* line of cases is similar to the exclusionary rule in that it does not involve the personal rights of the defendant. *See Powers v. Ohio*, 499 U.S. 400, 415 (1991) (holding that "a defendant in a criminal case can raise the *third-party equal protection claims of jurors* excluded by the prosecution because of their race.") (emphasis added); *see also Georgia v. McCollum*, 505 U.S. 42 (1992) (holding that criminal defendants may not engage in racially-discriminatory jury selection because it denies the prospective jurors of their right to not be excluded based on race); *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614 (1991) (holding that civil litigants may not utilize race-based peremptory challenges because the harm to excluded jurors is the same as in criminal cases).

> state courts. Thus from the beginning we have had in this country two essentially separate legal systems. Each system proceeds independently of the other with ultimate review in this Court of the federal questions raised in either system.

398 U.S. 281, 286 (1970). Thus, because "[t]he rank and authority of the courts are equal" (*Kline v. Burke Construction Co.*, 260 U.S. 226, 235 (1922)), only the Supreme Court may dictate to the state courts. *See Withrow v. Williams*, 507 U.S. 680, 723 (1993) (Scalia, J., concurring in part and dissenting in part) (noting that the Constitution "establishes this Court as the supreme judicial interpreter of the Federal Constitution and laws, but gives other federal courts no higher or more respected a role than state courts in applying that 'Law of the Land' ").[6]

Accordingly, even if the Illinois Supreme Court failed to properly apply *Batson* when it held that Henderson had not demonstrated a *prima facie* case of racial discrimination, the Seventh Circuit Court of Appeals' decision to issue a writ of habeas corpus unless a new *Batson* hearing is held in the state court is inappropriate. Under well-established principles of comity and federalism, the Illinois state courts are not bound by orders from lower federal courts. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 58-59 n.11 (1997) (referring to the Ninth Circuit's assertion that state courts should be bound by the decisions of lower federal courts as "remarkable"); *see* also *Lockhart v. Fretwell*, 506 U.S. 364, 376 (1997) (Thomas, J., concurring) (stating that state trial courts are bound only by the interpretations of federal law made by

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[6] Petitioner points out that a similar issue is currently pending before this Court in *Coulter v. Illinois*, No. 01-8639.

state reviewing courts and the United States Supreme Court); *Lindh v. Murphy*, 96 F.3d 856, 869 (7th Cir. 1996) (en banc) *rev'd on other grounds*, 521 U.S. 320 (1997) (stating that a conflict between the Seventh Circuit and a state supreme court would not authorize the issuance of a writ of habeas corpus because "State courts must knuckle under to decisions of the Supreme Court, but not of this court."). Accordingly, even if the Illinois courts' procedures were inadequate under *Batson*, the appropriate relief in such a situation is to remand the matter to the District Court for an evidentiary hearing, as that is the mechanism specifically authorized by Congress when a habeas petitioner's claims require further factual development. *See* 28 U.S.C. §2254(e)(2). *See also Williams v. Taylor*, 529 U.S. 420 (2000) (holding that an evidentiary hearing may be held under the AEDPA if the failure to develop all the facts in state court was not due to the lack of diligence of the petitioner).

CONCLUSION

WHEREFORE, for these reasons, the State of Illinois respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

DEMETRIUS HENDERSON, Petitioner-Appellee, Cross-Appellant, v. JONATHAN R. WALLS, Warden, Menard Correctional Center, Respondent-Appellant, Cross-Appellee.

Nos. 00-3834, 00-3778

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

296 F.3d 541; 2002 U.S. App. LEXIS 13644

June 11, 2001, Argued
July 9, 2002, Decided

SUBSEQUENT HISTORY: As Corrected July 11, 2002. Petition for Rehearing and Rehearing En Banc Denied August 22, 2002, Reported at: 2002 U.S. App. LEXIS 17848.

PRIOR HISTORY: Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. No. 97 C 1079. John A. Nordberg, Judge.

United States ex rel. Henderson v. Page, 2000 U.S. Dist. LEXIS 14540 (N.D. Ill. Sept. 29, 2000).

COUNSEL: For DEMETRIUS HENDERSON, Petitioner-Appellant (00-3778): Alan M. Freedman, Carol R. Heise, MIDWEST CENTER FOR JUSTICE, Chicago, IL USA.

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For THOMAS F. PAGE, Respondent-Appellee (00-3778): William L. Browers, OFFICE OF THE ATTORNEY GENERAL, Chicago, IL USA.

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JUDGES: Before COFFEY, DIANE P. WOOD, and EVANS, Circuit Judges.

OPINION BY: DIANE P. WOOD

OPINION:

DIANE P. WOOD, Circuit Judge. In 1987, a jury convicted Demetrius Henderson of kidnapping 16-year-old Kimberly Boyd, gang raping her, and then, to keep her from reporting the rape, killing her by stabbing her over 40 times and repeatedly running her over with a car. (A full recitation of the gruesome details, including the identities of the other three participants in the rape, can be found in *People v. Henderson,* 142 Ill. 2d 258, 568 N.E.2d 1234, 154 Ill. Dec. 785 (Ill. 1990).) After Henderson waived his right to a sentencing jury, the trial judge conducted a sentencing hearing and determined that Henderson was eligible for the death penalty because he was over 18 years old at the time of the murder and he had killed Boyd in the course of another felony. The judge then found that there were no mitigating factors and sentenced Henderson to death. He also imposed sentences of 45 years for the aggravated criminal sexual assault and 10 years for the aggravated kidnapping. Henderson's execution has been stayed pending his appeals and petitions for post-conviction relief.

On direct appeal, the Illinois Supreme Court upheld Henderson's convictions and death sentence, although it reduced the prison term for the aggravated criminal

sexual assault from 45 years to 30 years. *People v. Henderson,* 142 Ill. 2d 258, 568 N.E.2d 1234, 154 Ill. Dec. 785. It denied his petition for a rehearing, and the United States Supreme Court denied Henderson's petition for a writ of certiorari. *Henderson v. Illinois,* 502 U.S. 882, 116 L. Ed. 2d 189, 112 S. Ct. 233 (1991).

Henderson then filed a petition with the Circuit Court of Cook County for relief pursuant to the Post-Conviction Hearing Act, 725 ILCS 5/122-1 *et seq.* The court considered the allegations raised in the petition, heard arguments, and concluded that Henderson had failed to establish that he was entitled to an evidentiary hearing. The Illinois Supreme Court agreed that the post-conviction petition had no merit. *People v. Henderson,* 171 Ill. 2d 124, 662 N.E.2d 1287, 215 Ill. Dec. 147 (Ill. 1996). Once again, that court denied Henderson's petition for rehearing and the United States Supreme Court denied certiorari. *Henderson v. Illinois,* 519 U.S. 953, 136 L. Ed. 2d 259, 117 S. Ct. 369 (1996).

The case now before us began on February 8, 1997, when Henderson filed a seven-count petition in the district court seeking a writ of habeas corpus under 28 U.S.C. § 2254. His petition alleged, among other things, that (1) his trial counsel was ineffective in failing to present medical evidence in support of his claim that he was physically coerced into confessing to the crimes; (2) he did not knowingly and intelligently waive his right to a sentencing jury; and (3) the prosecution discriminated against African-Americans in using its peremptory challenges. The district court rejected Henderson's first two claims but granted relief based on its finding that the Illinois Supreme Court had unreasonably applied *Batson v. Kentucky,* 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712

(1986), when it categorically refused to consider the similarities between excluded African-American venire members and accepted non-African-American jurors in its evaluation of Henderson's *Batson* argument. *U.S. ex rel. Henderson v. Page,* 2000 U.S. Dist. LEXIS 14540, No. 97 at 1079, 2000 WL 1466204 (N.D.Ill. Sept. 29, 2000). The court ordered that the writ of habeas corpus would be granted unless the State of Illinois holds a new hearing on Henderson's *Batson* claim within 120 days of the date of the order.

The State appealed from the district court's conditional grant of the writ on the basis of the *Batson* violation. Henderson then cross-appealed after receiving a certificate of appealability from this court on the other two issues mentioned above: (1) whether he knowingly and intelligently waived his right to a sentencing jury since he was not informed that the jury must unanimously determine eligibility for the death sentence; and (2) whether trial counsel denied Henderson effective assistance of counsel at the suppression hearing in failing to present corroborating medical testimony that his confession was coerced. The later two errors, he argues, require additional relief not encompassed within the district court's order.

I

As amended by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254(d) allows a federal court to grant a petition for a writ of habeas corpus only if the state court's adjudication of the relevant claims "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

States." (The post-1996 version of § 2254 applies because Henderson filed his petition after the effective date of AEDPA. See *Gosier v. Welborn,* 175 F.3d 504, 506 (7th Cir. 1999).) Even under these standards, our review of the district court's decision to grant or deny habeas petitions is *de novo. Hall v. Washington,* 106 F.3d 742, 748 (7th Cir. 1997). AEDPA has not altered this court's review of a district court's legal conclusions. In conducting our *de novo* review, however, the question is whether the state court "unreasonably" applied clearly established federal law as the Supreme Court has determined it. *Id.* "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor,* 529 U.S. 362, 413, 146 L. Ed. 2d 389, 120 S. Ct. 1495 (2000).

The question then is "whether the [state court's] determination is at least minimally consistent with the facts and circumstances of the case." *Hennon v. Cooper,* 109 F.3d 330, 335 (7th Cir. 1997). In making this determination, we do not "defer" to the state court decision; AEDPA does not provide for the *Chevron* deference afforded administrative agencies. See *Lindh v. Murphy,* 96 F.3d 856, 868 (7th Cir. 1996) (en banc), rev'd on other grounds, 521 U.S. 320, 138 L. Ed. 2d 481, 117 S. Ct. 2059 (1997). We have recognized, however, that review under the amended statute is severely restricted: "the fact that we may think certain things could have been handled better by the state trial judge or by the prosecuting attorney or by a state reviewing court means very little." *Sanchez v. Gilmore,* 189 F.3d 619, 623 (7th Cir. 1999). Nonetheless, our review is not so limited as to require a

finding of judicial incompetence before we are allowed to overturn a state court's decision. See *Hall,* 106 F.3d at 749 ("Congress would not have used the word 'unreasonable' if it really meant that federal courts were to defer in all cases to the state court's decision.").

Applying these standards, we conclude that the district court correctly resolved all three claims we have identified here: the state courts unreasonably applied the Supreme Court's *Batson* decision, but their decisions on Henderson's other two arguments neither failed to apply the applicable law as announced by the United States Supreme Court nor did they unreasonably apply that law. We therefore affirm.

II

A.

We first consider the State's challenge to the district court's finding of a *Batson* violation. The record of this case comes to us in an unusual posture. The state court record at the trial level was somewhat cryptic regarding the *Batson* challenge, the *Batson* hearing (or lack thereof), and the racial make-up of the venire members both excluded and accepted. The Illinois Supreme Court noted the failure of the trial court to produce a proper record and conducted its own review of the facts regarding the number of challenges exercised by the parties and the races of the venire members challenged by the prosecution. *Henderson,* 568 N.E.2d at 1245. This, in our view, was a decision it was entitled to make. The only consequence for us is that it is the Illinois Supreme Court's own decision and its version of the facts that we now review, since that court chose to disregard the trial court's discussion and to conduct its

own detailed review of the record. With that in mind, we turn to the merits of the *Batson* claim.

Voir dire in Henderson's case took place for two separate venires. Examination of the first venire ended after only four jurors had been sworn in. At that point, the only African-American on the venire panel told the judge that he would be unable to concentrate fully on the case, the judge excused him for cause, and he dismissed the other chosen jurors and the entire venire panel.

The trial judge then held a second *voir dire* of a 40-person panel. Three individuals were struck for cause, leaving 11 African-Americans and 26 non-African-Americans on the venire panel. The prosecution and the defense were each allotted 14 peremptory challenges; the prosecution used 10 and the defense used 13. Of the 10 peremptory challenges exercised by the prosecution, six (60%) were used against African-Americans. The prosecutor then accepted 27 members, five of whom were African-American. The defense then exercised its peremptory challenges; the net result was that three of the 14 venire members chosen to serve as jurors or alternates were African-American.

After the jurors and alternates had been sworn in, but before opening statements, defense counsel moved for a mistrial on the basis that the prosecution had intentionally excluded African-American venire members from the jury through his exercise of peremptory challenges. (Although defense counsel may have forfeited this argument by failing to object earlier, the State failed to argue forfeiture and instead attacked the motion's merits. The Illinois Supreme Court was not concerned with forfeiture, and thus neither are we.) Defense counsel pointed out that: (1)

six of the ten venire members challenged by the prosecutor were African-American; (2) the jury consisted of ten non-African-Americans and two African-Americans; and (3) two of the three peremptory challenges exercised by the prosecutor during the first *voir dire* were exercised against African-Americans. The State responded by pointing to the fact that the prosecution did accept at least two and possibly three African-Americans that it could have struck.

At that point, the trial judge recognized that under *Batson* he had to "make a decision as to whether [he] should require the State to show cause as to why they made certain decisions regarding the jury," but the judge decided to wait until the next day to make a decision. The next day, a white juror was excused after she told the judge that she had some serious personal problems that would make concentration difficult. The first alternate, an African-American male, became a juror, leading to a final jury with three African-Americans. The judge then denied the *Batson* motion for a mistrial, finding that Henderson had not made out a *prima facie* case that the prosecution had excluded African-Americans from the jury in violation of *Batson,* especially in light of the fact that there were three African-Americans on the jury. The court's discussion was very limited. It reads as follows in the transcript:

> COURT: I think the composition of the jury speaks for itself in terms of no pattern of systematic exclusion of blacks. I think further the fact that there were other blacks who were accepted by the State and that the defense opted to remove, leads me to believe that there was no systematic exclusion, therefore, I am not going to inquire further. . . . [T]he fact that there are five minority people on the jury and others that were

> accepted by the State is sufficient for me to indicate that there was no systematic exclusion, which is what my ruling is.
>
> * * *
>
> I also have been a trial lawyer for twenty years and have picked a lot of juries in my own time, and I don't find that people that were excluded, to my mind, were excluded toward unknown reasons, I mean, we all guess as to why all jurors are kept and why they're not, that's why we have challenges that no one has to explain under the present state of the law. . . .

Henderson was ultimately convicted by a jury consisting of nine non-African-Americans and three African-Americans.

On direct appeal to the Illinois Supreme Court, Henderson argued that the prosecution used its peremptory challenges to exclude African-Americans from the jury, in violation of the Fourteenth Amendment as interpreted by the Supreme Court in *Batson v. Kentucky.* The Illinois Supreme Court rejected this argument. *Henderson,* 142 Ill. 2d 258, 568 N.E.2d 1234, 154 Ill. Dec. 785. It focused first on the fact that the prosecution had used only 60% of its peremptory challenges to exclude African-Americans and concluded that this was not enough to demonstrate a *prima facie* case of purposeful discrimination. 568 N.E.2d at 1249. Second, the court stated that the victim's race (African-American) negated any inference of prosecutorial discrimination, since (according to the court) prosecutors are more likely to use peremptory challenges in an improper way when they are trying to secure jurors of the same race as the victim in order to try and stir up racial hatred or fears. *Id.*

Henderson had argued that the only respect in which the struck African-Americans could be distinguished from the white jurors was by race. The court refused to consider this "comparison analysis" at the *prima facie* stage:

> [A]t this stage of a *Batson* claim we are only concerned with whether the stricken black venire members shared any characteristics other than race; it is not our role to search for possible reasons for the prosecution's strikes or for similarities between stricken black and accepted white venire members. 568 N.E.2d at 1249-50.

The court then looked at several other factors which are not relevant to this appeal. While the court was concerned with the disparity between the percentage of African-Americans on the venire (30%) and the percentage of African-Americans on the jury (plus alternates) (21%), the court found that the rest of the relevant factors were either neutral or tended to refute an inference of discrimination. Accordingly, the court held that the trial court's finding that the defendant failed to establish a *prima facie* case of purposeful discrimination was not against the manifest weight of the evidence. 568 N.E.2d at 1250.

In his petition for habeas corpus relief, Henderson repeated the arguments he had advanced in the Illinois Supreme Court. The district court found no error in most of the Illinois Supreme Court's holdings regarding *Batson*. It found, however, that the state court had erred in its application of the *Batson* test and it conditionally granted the writ unless the State followed up with appropriate proceedings in state court.

B.

In *Batson v. Kentucky,* the Supreme Court held that a prosecutor is forbidden from challenging potential jurors solely on the basis of their race or on assumptions about black jurors as a group. 476 U.S. at 89. It established a three-part framework for considering challenges to a prosecutor's use of peremptory challenges. First, the defendant must establish a *prima facie* case of purposeful racial discrimination by the prosecutor in her use of peremptory challenges "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Id.* at 93-94, 106 S. Ct. 1712. If the defendant succeeds in making out a *prima facie* case, the prosecutor must offer race-neutral explanations for her exercise of peremptory challenges. *Id.* at 97. Once the prosecutor has made that proffer, the defendant may argue that the stated reasons are pre-textual, and the trial court then makes a final determination. *Id.* at 98. Neither the trial court nor the Illinois Supreme Court moved past the first stage: they both found that Henderson had not made out a *prima facie* case of discrimination, and so the prosecutor was never formally asked to explain his use of peremptory challenges. The only mention of potentially race-neutral reasons came much later in the State's brief to the Illinois Supreme Court; Henderson argued pretext in his reply brief.

Batson also laid out what a defendant must do to establish a *prima facie* case. First, the defendant must show that she is a member of a cognizable racial group. Second, she must show that the prosecutor exercised peremptory challenges to remove venire members of the defendant's race. Finally, the defendant must show that these facts and any other relevant circumstances raise an

inference that the prosecutor excluded venire members on account of their race. *Id.* at 96.

Batson does not provide a checklist of what trial judges should consider in evaluating these challenges. Instead, the Supreme Court said more generally that "in deciding whether the defendant has made the requisite showing, the trial court should consider *all* relevant circumstances." *Id.* (emphasis added). *Batson* gave two examples of relevant circumstances: (1) "a pattern of strikes against black jurors included in the particular venire" and (2) "the prosecutor's questions and statements during *voir dire* examination." It emphasized, however, that its "examples [were] merely illustrative." *Id.* at 97. The issue now before us is whether this precedent from the Supreme Court permits a state court to exclude, at the *prima facie* stage, proffered evidence that compares excluded African-American venire members with the accepted white jurors.

The Illinois Supreme Court determined, as a matter of law, that the comparison of excluded African-American venire members with white jurors was not relevant evidence: "at this stage . . . it is not our role to search . . . for similarities between stricken black and accepted white venire members." *Henderson,* 568 N.E.2d at 1250. Perhaps it was not the court's role to "search" for similarities, but in this case, Henderson had vehemently requested a comparison analysis and provided the court with all of the relevant characteristics of the excluded and accepted venire members. Declining to search out similarities is far different from refusing to consider, on relevance grounds, evidence of similarities when the defendant presents it. We see nothing in *Batson* that takes such a crabbed view of what might be relevant to the consideration of "all" the

circumstances surrounding the exercise of the state's peremptory challenges. Indeed, this court has already interpreted *Batson* to require a consideration of precisely this kind of comparison evidence. See *Mahaffey v. Page,* 162 F.3d 481, 484 (7th Cir. 1998). Our decision in *Mahaffey* is obviously not directly applicable here, as we may look only to Supreme Court decisions as the source of law. But *Mahaffey* did express our understanding of the scope of *Batson,* and as such we find it a useful secondary source. Even with the benefit of further briefing in this case, we can find nothing in *Batson* that entitles a state court to exclude from the *prima facie* case an entire category of evidence that has the potential to throw light on the question of intentional discrimination.

We conclude that it was an unreasonable application of *Batson* for the Illinois Supreme Court to decline to consider this evidence as part of the *prima facie* determination. As we commented in *Mahaffey,* "if an excused African-American had characteristics and opinions that were similar to those of a juror who sat, for example, then an obvious inference . . . would be that the strike was racially motivated." *Id.* at 485. Of course, had Henderson not requested the comparison analysis, and had he not offered the evidence necessary for a proper analysis, a comparison may not have been a "relevant circumstance" for the state court to consider. But Henderson actually made all the arguments and provided all of the evidence necessary to allow the court to conduct the analysis.

First, in his appellate brief to the Illinois Supreme Court, Henderson explicitly asked the court to do a comparison analysis: "Just as the sole factor shared by 8 black jurors was their race, the sole factor which distinguished them from the ten white jurors who were seated [was] also

their race. . . . The record here establishes that the State exercised 8 of 13 peremptory challenges against blacks . . . whose sole distinguishing characteristic from the ten white jurors who were selected was also their race." (Granted, Henderson did not make this argument before the trial court, but as we already discussed, we are examining the Illinois Supreme Court's decision.)

Henderson then laid out all of the information that the prosecutor had elicited about the six African-American venire members who were excluded by the State as well as the white jurors who ultimately sat on the jury. This information included the venire members' marital status, residence, employment, whether they had children, whether they had friends or family members who were lawyers or law enforcement officers, and whether they or a friend or a family member had ever been victimized by crime. In its response brief, the State offered several race-neutral explanations for its use of peremptory challenges. First, it detailed the characteristics that it found "favorable": having been a victim of a crime or having a close friend or family member who was a lawyer or law enforcement officer. Second, the State claimed that it had removed many of the African-Americans because they were single and lived alone.

Henderson's reply brief focused almost exclusively on the comparison argument and attempted to show pretext by comparing the excluded black venire members with the accepted white jurors. He argued that of the ten white jurors originally empaneled, only four were friends or relatives of police officers or lawyers; the State accepted six white jurors without this characteristic. Of the ten white jurors, only three had been crime victims; the State accepted seven white jurors without this characteristic.

The State also accepted five white jurors who possessed neither of these characteristics and exercised a peremptory challenge against an African-American venire member who possessed both of these characteristics. Finally, Henderson took issue with the argument that most of the excluded African-Americans were single and lived alone – of the six African-American jurors excluded, only three were single and lived alone. And the State accepted two white jurors who were single and lived alone.

We are troubled by the Illinois Supreme Court's dismissal of this evidence; after proper analysis, such statistics might support a finding of race discrimination in the use of peremptory challenges. Evidence of this type is indisputably part of the "relevant circumstances" that *Batson* requires a state court to consider at the *prima facie* stage. We therefore conclude that the Illinois Supreme Court's decision rejecting its relevance was an unreasonable application of *Batson*. In holding, we offer two caveats: First, we are not actually making a finding that this evidence supports a finding of discrimination – such a finding would be appropriate only after a proper statistical analysis. Nor are we conducting the comparison analysis or determining the validity of the State's justifications. This will all be the task of the state courts, should the State choose to pursue this matter in the proper tribunal. Second, we are not requiring that a comparison analysis be done at the *prima facie* stage of every *Batson* hearing. This case is about an erroneous exclusion of proffered testimony that meets the relevance standard, not about a possible failure to come forward with evidence on either side's part. In some instances, or perhaps even often, a defendant will not come forward with comparison evidence until step three; in those instances, the court will evaluate

the *prima facie* case based on what is before it. But when a court does have before it all of the evidence necessary for a comparison analysis, it cannot simply ignore this evidence.

We also note our concern with the Illinois Supreme Court's statement, set forth here, that the fact that the victim was of the same race as the defendant tended to preclude a finding of purposeful discrimination:

> [W]e find that, when deducing the existence of a *prima facie* case of purposeful discrimination, whether or not the defendant and the defendant's victims are members of the same cognizable racial group is a relevant factor. In a case where the defendant is black and the victim is white, we recognize, at the prima facie stage of establishing a *Batson* claim, that there is a real possibility that the prosecution, in its efforts to procure a conviction, will use its challenges to secure as many white jurors as possible in order to enlist any racial fears or hatred those white jurors might possess. On the other hand, in a case where both the defendants and victim are black, their racial characteristics do not warrant an inference, at the prima facie stage, that the prosecution discriminated against venire members who were black. Furthermore, we refuse to conclude that the fact that the defendant is black supports an inference of prosecutorial discrimination regardless of the victim's race. 568 N.E.2d at 1249 (internal citations omitted).

This reasoning, in our view, is not only inconsistent with the *Batson* line of cases. It also conflicts with more general Supreme Court jurisprudence. *Batson* itself was concerned with the race of the juror and the defendant, *not* with that of the victim: "the Equal Protection Clause

forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." 476 U.S. at 89. In post-*Batson* cases, the Supreme Court has made it clear that it is worried about much more than simple bias or protectionism; *Batson* has been interpreted to require race neutrality in exercising peremptory challenges, regardless of the race of the defendant, victim, or witness. See *Powers v. Ohio,* 499 U.S. 400, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991) (criminal defendant may object to race-based exclusions of jurors even if the defendant and the excluded juror do not share the same race); *Georgia v. McCollum,* 505 U.S. 42, 120 L. Ed. 2d 33, 112 S. Ct. 2348 (1992) (defense counsel also not allowed to exercise peremptory challenges based on race). The Court is concerned with race discrimination, the risk of depriving jurors of a significant opportunity to participate in civic life, and the risk of undermining confidence in our system of justice. In short, these cases emphasize the fact that "a person's race simply is unrelated to his fitness as a juror" regardless of the race of the defendant *or* the victim. *Powers,* 499 U.S. at 410 (internal quotations omitted).

Furthermore, the United States Supreme Court has rejected the logic behind the Illinois Supreme Court's theory. As the Court has recognized, people do not always identify with or protect people from their own racial group. In *Castaneda v. Partida,* 430 U.S. 482, 51 L. Ed. 2d 498, 97 S. Ct. 1272 (1977), the Court held that the fact that a county was 79.1% Mexican-American did not dispel a presumption that the county officials discriminated against Mexican-Americans in summoning citizens for the grand jury. In other words, sometimes persons of one race

discriminate against persons of the same race – "it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of their group." 430 U.S. at 499. See also *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 140 L. Ed. 2d 201, 118 S. Ct. 998 (1998) (holding same-sex sexual harassment actionable under Title VII). These cases require us to reject stereotypical assumptions that African-Americans would want to protect members of their own race from punishment and that whites would be more willing to convict an African-American defendant, depending on the race of the victim.

In the final analysis, we conclude that the critical error lay in the state court's application of *Batson's* "all circumstances" rule, and that this alone is enough to require us to affirm that part of the district court's judgment. We need not decide, therefore, whether the state court's assumption about the relevance of the victim's race would independently require the same result.

III

We turn now to the two issues that Henderson has presented in his cross-appeal: ineffective assistance of counsel, and ineffective waiver of a sentencing jury. As to these, we detect no failure on the part of the Illinois Supreme Court either to identify or to apply in a reasonable fashion the applicable law as set forth by the United States Supreme Court.

A.

When Henderson was arrested for his crimes, he gave police officers and an assistant state's attorney a

fifteen-page court-reported confession. Prior to trial, defense counsel moved to suppress the confession, arguing that the interrogators coerced Henderson's statement by slapping him, punching him, and striking him on the head with a telephone book until he confessed. At the suppression hearing, the only testimony presented was that of Henderson and the police officers and the assistant state's attorney present at the interrogation. Henderson's counsel did not offer any medical testimony regarding the alleged beating or the resulting hearing loss. In response to Henderson's allegation of abuse, the police officers and the assistant state's attorney testified that none of them had struck or punched him. The assistant state's attorney also testified that Henderson had never complained to him about being struck by the police officers. Henderson's signed statement indicated that he had been treated fairly and that no threats had been made. A photograph which was taken after he gave his statement showed no signs of injury. And on cross-examination during the hearing, Henderson testified that during a prison intake examination on the day after his arrest, he did not complain of any injuries and stated that he was in good health. The trial court denied the motion to suppress, finding Henderson's testimony incredible when compared to the police officers' denials of the beating.

In his post-conviction petition, Henderson argued that his counsel was ineffective in failing to present medical evidence corroborating his allegations of physical abuse during his interrogation, including available medical records from Cermak Health Services and the Illinois Department of Corrections which indicated that Henderson had suffered an inner ear injury. The first medical record to which he referred was the initial report of injury,

dated August 19, 1986, which said that Henderson claimed he was hit in the left ear by police during his interrogation on July 17 or 18. The report noted that Henderson claimed that his ear had been bleeding, that he had trouble hearing and that there was a small perforation on the ear. A second record, dated December 30, 1986, notes that Henderson complained of earaches, had wax in his left ear, and that he was given medication. The next two records indicated that Henderson had ear wax and that he complained of having bronchitis. In another record, dated March 24, 1987 (about a month before the hearing), Henderson complained of having an earache, headaches, and dizziness. There was a notation that read "one [i]nmate hit him on the [left] side of the head." In an April 7, 1987, record, there was a notation of "head trauma 2d fight."

The Illinois Supreme Court found that the medical records were ambiguous in their support for Henderson's motion for suppression. *People v. Henderson,* 171 Ill. 2d 124, 662 N.E.2d 1287, 1298, 215 Ill. Dec. 147 (Ill. 1996). Critically, it was impossible to tell from the records when Henderson's hearing loss occurred or how it occurred, and an inference could be drawn that the hearing loss was caused by subsequent fights with other inmates rather than a police beating. Thus, counsel's failure to present the records was within the range of normal professional competence. Additionally, the court found that the outcome of the suppression hearing would probably not have changed had the records been entered because the State had considerable evidence to support its claim of voluntariness: the confession, the testimony of the police and the assistant state's attorney's testimony, the lack of any complaints of injury prior to the hearing, and the photos

taken after the interrogation which did not show any injury. 662 N.E.2d at 1297-98. Both the lack of any conclusive support for Henderson's theory and the strength of the State's case meant that counsel's decision, whether competent or not, caused no prejudice to Henderson. The court accordingly found that, under the standards established by the Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984), Henderson had not established a claim of ineffective assistance of counsel. *Henderson,* 662 N.E.2d at 1296-98.

The district court found that the State court's dismissal of the ineffective assistance claim was not an unreasonable application of the *Strickland* rule. Under *Strickland,* a defendant alleging ineffective assistance of counsel must show that trial counsel's performance fell below "an objective standard of reasonableness," 466 U.S. at 688, and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. It could have been ineffective for defense counsel to fail to use available evidence to corroborate Henderson's testimony, see *Washington v. Smith,* 219 F.3d 620, 632 (7th Cir. 2000), but the medical records here did not provide such corroboration. The records established only that Henderson was complaining about earaches and hearing loss; the records could not establish with any degree of certainty the source of Henderson's ear problems. To the contrary, given the repeated references to Henderson's involvement in prison fights, the medical records create a strong inference that the injury was inflicted by a fellow inmate. Additionally, the state court reasonably concluded that Henderson could not show that there was a reasonable probability that, had

the medical records been presented, the judge would have suppressed the confession.

Henderson argues, however, that a decision on the merits of the ineffective assistance claim is premature because he has not yet been allowed discovery on this issue. Right after filing his § 2254 petition, Henderson moved under 21 U.S.C. § 848(q)(4)(B) and Habeas Corpus Rule 6(a) for the court to appoint a medical expert to examine his ear. The district court denied the motion, *U.S. ex rel. Henderson v. Page,* 1997 U.S. Dist. LEXIS 10208, No. 97 C 1079, 1997 WL 399623 (N.D. Ill. July 11, 1997), and also denied Henderson's motion for reconsideration. He argues now that a deposition of a medical expert was necessary in order to support his ineffective assistance claim.

A § 2254 petitioner is allowed to invoke discovery, but only "if and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." Habeas Corpus Rule 6(a); see also *Bracy v. Gramley,* 520 U.S. 899, 904, 138 L. Ed. 2d 97, 117 S. Ct. 1793 (1997). In order to meet the Rule 6(a) requirements, Henderson must (1) make a colorable claim showing that the underlying facts, if proven, constitute a constitutional violation; and (2) show "good cause" for the discovery. See *Harris v. Nelson,* 394 U.S. 286, 298-300, 22 L. Ed. 2d 281, 89 S. Ct. 1082 (1969). As we already discussed, Henderson has not presented a colorable claim of ineffective assistance. In some cases, it may be incompetent for trial counsel to fail to have a defendant examined by a medical expert, see *U.S. ex rel. Emerson v. Gramley,* 883 F.Supp. 225, 244 (N.D. Ill. 1995), aff'd, 91 F.3d 898 (7th Cir. 1996), but Henderson has not shown that, in his case, the medical expert's testimony would have made a

difference. A medical expert could not conclusively establish who struck Henderson in the ear or even how he was struck. Additionally, any new medical evidence would have been rebutted by the contemporaneous testimony of the police officers, the assistant state's attorney, the post-interrogation photos, and the fact that Henderson had never complained earlier about the abuse. Under the circumstances, the district court did not abuse its discretion in refusing to permit this discovery.

B.

During a pre-trial discussion of possible *voir dire* questions, Henderson's counsel told the judge that his client was prepared to waive his right to a jury for sentencing purposes. The questioning of Henderson proceeded as follows:

> COURT: If you are found guilty, there first has to be a hearing to determine whether or not you are eligible for the death penalty. There is [sic] a number of factors that enter into that and it is a decision I make as the judge. Assuming that you were eligible for the death penalty then there has to be a hearing by the same jury who decided guilt or innocence as to whether or not that penalty is appropriate for you as an individual pertaining to this crime and the other factors that I'm sure you have gone over with your lawyer. Do you understand all that?
>
> HENDERSON: Yes.
>
> COURT: You have a right to have a jury determine that or you can have the judge determine that, in this case that would be me. Do you understand that?

HENDERSON: Yes.

COURT: If you make a decision to have me decide it and not the jury then at this point the jury just decides your guilt or innocence and that is the last thing the jury does, they go home and they don't make any other decisions. Do you understand that?

HENDERSON: Yes.

COURT: And then I would make the other decision in the case regarding the second and third stage I told you about. Okay? Do you understand that?

HENDERSON: Yes, sir.

COURT: And your lawyer has just told me that it is your decision at this point not to have a jury decide whether or not the death penalty is appropriate if, in fact, we get to that part of the case. Is that correct?

HENDERSON: Yes.

COURT: And you would rather have me decide that rather than a jury, is that right?

HENDERSON: Yes

* * *

COURT: Mr. Linn [defense counsel], do you feel that your client understands sufficient to make this decision with you?

MR. LINN: Yes

COURT: Mr. Henderson, I will ask you one more time, should we get to the point where the State is requesting a hearing as to whether the death penalty is appropriate, do you want me to

hear it rather than twelve people from the community?

HENDERSON: Yes, I do.

Henderson then signed a written waiver stating that "I hereby waive my right to have a Jury determine whether the Death Penalty should be imposed." As already mentioned, the judge, rather than a jury, ultimately determined Henderson's sentences.

In his appeal to the Illinois Supreme Court, Henderson argued that he did not knowingly and intelligently waive his right to have a sentencing jury because the trial judge incorrectly explained who would make the eligibility determination. The trial judge told Henderson that even if Henderson did not waive his right to a sentencing jury, he, the judge, would still make the eligibility determination.

Henderson is correct that Illinois law requires that the sentencing jury, if there is one, is the entity that determines eligibility for the death penalty. The Illinois Supreme Court agreed with him on this point and found that the judge had indeed made a misstatement. In spite of that mistake, however, the Illinois Supreme Court went on to find that Henderson's waiver was knowing and intelligent. It relied on a number of facts for that conclusion: Henderson consulted with his attorney; he said he understood the consequences of waiver; his attorney said that he thought Henderson's decision was made knowingly and intelligently; and finally, Henderson had already made his decision with his lawyer before the judge made the misstatement, and so his waiver decision probably was not based on the judge's misstatement of law. 568 N.E.2d at 1270-71.

Henderson also argued that his waiver was not knowing and intelligent because the trial judge did not tell him that a jury's decision to sentence him to death would have to be unanimous. However, the Illinois Supreme Court has consistently held that failure to do this is not reversible error, see *People v. Buggs,* 112 Ill. 2d 284, 493 N.E.2d 332, 97 Ill. Dec. 669 (Ill. 1986), *People v. Albanese,* 104 Ill. 2d 504, 473 N.E.2d 1246, 85 Ill. Dec. 441 (Ill. 1984), and Henderson gave the court no reason to reconsider its earlier holdings. 568 N.E.2d at 1271.

In his § 2254 petition, Henderson argued that the court's decision that the waiver was voluntary and knowing was "contrary to" *Brady v. United States,* 397 U.S. 742, 748, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970) (waivers "not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences") and *Adams v. U.S. ex rel. McCann,* 317 U.S. 269, 279, 87 L.Ed. 268, 63 S. Ct. 236 (1942) (accused can only waive constitutional rights "if he knows what he is doing and his choice is made with eyes open").

These cases and others establish the broad proposition that any waiver must be knowing and voluntary, but they do not deal with the narrow issue of whether a misstatement about the eligibility determination or failure to inform a capital defendant about the "one juror rule" makes a waiver invalid. Our task is to decide whether the Illinois Supreme Court's decision was an unreasonable application of cases like *Brady* and *McCann.* We find that it was not.

The Illinois Death Penalty Statute affords capital defendants the absolute right to a jury for sentencing

unless the defendant waives that right. Ill. Rev. Stat 1983, Ch. 38, sec. 9-1(d). If the defendant does not waive his right to a jury, the jury, not the judge, determines eligibility. *Id.* at sec. 9-1(g). Henderson argues that his waiver of a sentencing jury was not made knowingly since the judge misinformed him about the jury's role in the eligibility phase of his death penalty hearing. The Illinois Supreme Court found this argument for the reasons we have already described.

We agree with the state court that Henderson cannot establish a link between the misstatement regarding the eligibility determination and his decision to waive his right. Not only was the decision seemingly made before the judge made his misstatement, but also, as the district court noted, Henderson's eligibility for the death penalty was a foregone conclusion – he was over 18 at the time of the murder and he committed the murder in the course of another felony (kidnapping and rape). The only way the jury could have found that Henderson was not eligible for the death penalty was if it had disregarded the governing legal standards. Henderson has no right to such jury nullification. *United States v. Perez,* 86 F.3d 735, 736 (7th Cir. 1996).

Henderson's reliance on his alleged lack of knowledge about the "one juror" rule in the Illinois Death Penalty Statute fails for another reason. That rule requires jurors to agree unanimously before they may impose the death penalty (*Id.* at sec. 9-1(g)). If the jury does not unanimously agree, a term of imprisonment must be imposed by the court. *Id.* This court has issued opinions recognizing the importance of a defendant's knowledge of the unanimity requirement, see *Hall v. Washington,* 106 F.3d 742, 752-53 (7th Cir. 1997) (attorney's failure to inform his

client about the one juror rule can contribute to a finding of ineffective assistance of counsel) and *St. Pierre v. Cowan,* 217 F.3d 939, 951 (7th Cir. 2000) (waiver can be invalidated if a judge affirmatively misinforms a defendant about the one juror rule). As a practical matter, we suspect that the unanimity requirement is perhaps the most important factor a defendant should consider before waiving his right to a sentencing jury. After all, intuition suggests that a chance at persuading one out of twelve people to recommend mercy will often be better than a chance to persuade one out of one. Nevertheless, the United States Supreme Court has never ruled that a judge must make a capital defendant aware of the one juror rule, and has in fact denied certiorari in cases in which state supreme courts have determined that a waiver was valid even when a capital defendant was not told about the unanimity requirement. See *Jells v. Ohio,* 498 U.S. 1111, 112 L. Ed. 2d 1101, 111 S. Ct. 1020 (1991); *Robertson v. California,* 493 U.S. 879, 107 L. Ed. 2d 169, 110 S. Ct. 216 (1989). Until the Court does so, and makes such a ruling applicable to cases on collateral review, this argument cannot succeed.

IV

For these reasons, we AFFIRM the judgment of the district court in its entirety. Specifically, we affirm the grant of the writ of habeas corpus, unless the State chooses within 120 days of the mandate of this court to seek a *Batson* hearing in the state court.

CONCUR BY: COFFEY

CONCUR:

COFFEY, Circuit Judge, concurring.

I.

I concur with the majority's holding that while it is not the trial court's *obligation to search* for evidence suggesting that the State struck potential jurors on the basis of race, the trial court also may not *refuse to consider* evidence proffered by a defendant attempting to raise a *prima facie* case of discrimination in the jury selection process. Thus, I agree with the majority's statement that in the extraordinary case when a defendant "request[s] a comparison analysis and provide[s] the court with all of the relevant characteristics of the excluded and accepted venire members," the trial court may not "exclude from the *prima facie* case an entire category of evidence that has the potential to throw light on the question of intentional discrimination." *Ante* at 11

However, I am unable to join the majority's expression of "concern with the Illinois Supreme Court's statement . . . that the fact that the victim was of the same race as the defendant tended to preclude a finding of purposeful discrimination" in this case. *Ante* at 14. I believe that whenever a *Batson* hearing takes place, one of the many relevant factors in the analysis of whether the State engaged in intentional discrimination must include

whether the stricken venirepersons were of the same race as the defendant and the victim.[1]

I condemn racism, as do most other people worthy of being called citizens of this great country, and I believe it is the duty of the trial judge to ensure that the jury selection process is free of any hint of racism and/or prejudice. At the same time, I feel strongly that appellate courts should exercise great restraint and avoid interfering with the trial judge's ultimate determination – based upon the court record and upon the judge's observations, judgment, and life experiences – of whether there has been a *Batson* violation in any given case.

When *Batson* hearings are held in cases dealing with a black defendant and a black victim, the trial judge may very well doubt that the prosecutor was striking black venirepersons on the basis of their race. The vast majority of counsellors I have dealt with, whether for the defense or the prosecution, are upstanding, conscientious public servants who take seriously their obligations under *Batson v. Kentucky,* 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986), and believe that men and women of all races are equally able to evaluate cases in an impartial manner based solely on the evidence presented to them. If the

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[1] *See, e.g., Simmons v. Beyer,* 44 F.3d 1160, 1167 (3d Cir. 1995); *Valdez v. People,* 966 P.2d 587, 595, 27 Colo. Law. No. 11 236 n. 17 (Colo. 1998); *Jefferson v. United States,* 631 A.2d 13, 23 n. 7 (D.C. 1993) (Rogers, C. J., dissenting); *State v. Duncan,* 802 So. 2d 533, 552 (La. 2001); *Stanley v. State,* 313 Md. 50, 542 A.2d 1267, 1277 n. 11 (Md. 1988); *Mack v. State,* 650 So. 2d 1289, 1298 (Miss. 1994); *State v. King,* 353 N.C. 457, 546 S.E. 2d 575, 586 (N.C. 2001); *Commonwealth v. Hill,* 1999 PA Super 48, 727 A.2d 578, 583 (Pa. 1999); *State v. Evans,* 100 Wn.App. 757, 998 P.2d 373, 381 (Wash. Ct. App. 2000).

judge has knowledge of or is advised by some other reliable source that the prosecutor believes that race is an irrelevant factor, then the judge might be more likely to believe that the prosecutor's proffered race-neutral reason for striking an individual black venireperson is truthful. Thereafter, upon review of the entire record and based upon his or her knowledge and observations, the trial judge may rule that the defendant has failed to carry his burden of establishing a constitutional violation.[2] Thus, I believe, unlike the majority, "that the fact that the victim was of the same race as the defendant" may, indeed, "tend[ ] to preclude a finding of purposeful discrimination by the prosecution," provided that this fact is considered along with all the other facts and evidence in the record. *See id.* at 96-98.

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[2] *See, e.g., United States v. Marin,* 7 F.3d 679, 686 n. 4 (7th Cir. 1993); *United States v. Causey,* 185 F.3d 407, 412-13 (5th Cir. 1999); *Mack,* 650 So. 2d at 1298; *see also Georgia v. McCollum,* 505 U.S. 42, 60-61, 120 L. Ed. 2d 33, 112 S. Ct. 2348 (1992) (Thomas, J., concurring).

Indeed, some social science research indicates that black jurors are, in fact, more likely than members of other races to convict black defendants in cases involving black victims. *See, e.g.,* D.C. Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility,* 15 J.EXPTL. SOC. PSYCH. 133 (1979); M. Miller & J. Hewitt, *Conviction of a Defendant as a Function of Juror-Victim Racial Similarity,* 105 J. SOC. PSYCH. 159 (1978); *see also* C. Lee, *Race and the Victim,* 73 CHI.-KENT L. REV. 533, 545-46 (1998); D.A. Clay, *Race and Perception in the Courtroom,* 67 TUL. L. REV. 2335, 2353 (1993). Because no rational prosecutor would strike venirepersons who he believes are sympathetic to his case, it is reasonable for a trial judge to believe that a prosecutor would not strike black venirepersons in cases involving a black defendant and a black victim.

II.

I also wish to comment on the value of the statistical evidence proffered by Henderson in an effort to establish discrimination in the jury selection process in this case. According to Henderson, his statistics demonstrate that the Government used peremptory challenges to strike more blacks from the venire panel than similarly-situated whites. Although the majority states, on the one hand, that "we are not actually making a finding that this evidence supports a finding of discrimination," the majority goes on to state that "after proper analysis, [Henderson's] statistics *might support* a finding of race discrimination" and that "such a finding would be appropriate *only after a proper statistical analysis.*" *Ante* at 13. I write separately to point out and make clear that this present record is *barren of any evidence* except Henderson's statistics and that the trial judge should not rely solely on statistical evidence, standing alone without consideration of all the other facts and circumstances in the record, to find discrimination. Statistical evidence must always be considered along with all the other materials in the record and may not be given controlling weight as a matter of law.

I well remember Mark Twain's adage (which was later repeated in *Griffin v. Board of Regents,* 795 F.2d 1281 (7th Cir. 1986)) that "there are three kinds of lies – lies, damned lies and statistics." *Id.* at 1289. Statistics may be, and frequently are, very helpful and trustworthy when properly calculated and properly applied to the situation at hand along with all of the other evidence in the record. However, when viewed in isolation without proper consideration of the entire record, a statistical comparison illustrating the prosecutor's use of peremptory challenges

against "similarly-situated" black and white venirepersons is of little value, for the statistics may fail to account for "the variety of factors and considerations that go into a lawyer's decision to select certain jurors while challenging others that appear to be similar." *People v. Johnson,* 47 Cal.3d 1194, 767 P.2d 1047, 1056, 255 Cal. Rptr. 569 (Cal. 1989). Some of the myriad of potential factors for striking potential jurors might include not merely whether the juror has a prior police record but also the severity of the criminal history; not only whether the juror was a victim of crime but also the nature of the crime and the date of the event; not only whether the juror's family has had prior contacts with law enforcement officers or attorneys, but also the nature and number of those contacts as well as the quality of the friendly and unfriendly relationship between the venireperson and the relative involved and law enforcement officer involved.

"Trial lawyers recognize that it is a *combination of factors rather than any single one* which often leads to the exercise of a peremptory challenge. In addition, *the particular combination or mix of jurors which a lawyer seeks may, and often does, change* as certain jurors are removed or seated in the jury box." *Id.* Thus:

> It may be acceptable, for example, to have one juror with a particular point of view but unacceptable to have more than one with that view. If the panel as seated appears to contain a sufficient number of jurors who appear strong-willed and favorable to a lawyer's position, the lawyer might be satisfied with a jury that includes one or more passive or timid appearing jurors. *However, if one or more of the supposed favorable or strong jurors is excused either for cause or peremptory challenge and the replacement jurors*

> *appear to be passive or timid types, it would not be unusual or unreasonable for the lawyer to peremptorily challenge one of these apparently less favorable jurors even though other similar types remain.* These same considerations apply when considering the age, education, training, employment, prior jury service, and experience of the prospective jurors. *It is also common knowledge among trial lawyers that the same factors used in evaluating a juror may be given different weight depending on the number of peremptory challenges the lawyer has at the time of the exercise of the particular challenge and the number of challenges remaining with the other side.* Near the end of the voir dire process a lawyer will naturally be more cautious about "spending" his increasingly precious peremptory challenges. Thus at the beginning of voir dire the lawyer may exercise his challenges freely against a person who has had a minor adverse police contact and later be more hesitant with his challenges on that ground for fear that if he exhausts them too soon, he may be forced to go to trial with a juror who exhibits an even stronger bias. Moreover, as the number of challenges decreases, a lawyer necessarily evaluates whether the prospective jurors remaining in the courtroom appear to be better or worse than those who are seated. If they appear better, he may elect to excuse a previously passed juror hoping to draw an even better juror from the remaining panel.

767 P. 2d at 1056-57.

It should be apparent, therefore, that the very dynamics of the jury selection process make it difficult, if not impossible, to focus exclusively on statistics when comparing the peremptory challenge of one juror with the

retention of another juror who on paper appears to be substantially similar. I make this point for I trust that the Illinois state courts will not be left with the misconception that Henderson's statistical evidence, standing alone, will necessarily support a finding that the State discriminated in the jury selection process.

We must never forget that "a trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses derived from a juror's responses at voir dire or a juror's 'bare looks and gestures.'" *J.E.B. v. Alabama,* 511 U.S. 127, 148, 128 L. Ed. 2d 89, 114 S. Ct. 1419 (1994) (O'Connor, J., concurring). The trial judge normally determines whether an improper factor motivated a lawyer's use of a peremptory challenge not by looking at statistics alone but by judging the lawyer's credibility. *See Marin,* 7 F.3d at 686 (quoting *United States v. Williams,* 934 F.2d 847, 849 (7th Cir. 1991)). As we have previously stated:

> A trial judge develops an intuitive sense for evaluating the actions played out in the courtroom. An evaluation – such as determining credibility – is often difficult to make from reviewing a written transcript (or even viewing a video replay). It is the trial judge's sensory perceptions of what occurs during the course of a case, combined with an understanding of the bar and the public gained from experience in the community served by the court, which provides the trial judge with a unique insight [into the question of discrimination].

Id.; see also J.E.B., 511 U.S. at 158 (Scalia, J., dissenting) ("I am less inclined to demand statistics, and more

inclined to credit the perceptions of experienced litigators who have had money on the line.").

Having made these observations, I concur in the majority opinion.

APPENDIX B

UNITED STATES OF AMERICA ex rel. DEMETRIUS HENDERSON, Petitioner, v. THOMAS PAGE, Warden, Menard Correctional Center, Respondent.

No. 97 C 1079

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

2000 U.S. Dist. LEXIS 14540

September 29, 2000, Decided
September 29, 2000, Docketed

DISPOSITION: Writ of habeas corpus granted unless State of Illinois holds appropriate new hearing on Petitioner's *Batson* claim within 120 days.

COUNSEL: For DEMETRIUS HENDERSON, petitioner: Alan Michael Freedman, Freedman & Bornstein, Chicago, IL.

For DEMETRIUS HENDERSON, petitioner: Carol R. Heise, Attorney at Law, Chicago, IL.

For THOMAS PAGE, respondent: Chief of Criminal Appeals, Illinois Attorney General's Office, Chicago, IL.

For THOMAS PAGE, respondent: Renee Goldfarb, Cook County State's Attorney's Office, Chicago, IL.

JUDGES: John A. Nordberg, Senior United States District Judge.

OPINION BY: John A. Nordberg

OPINION: MEMORANDUM OPINION AND ORDER

Petitioner Demetrius Henderson ("Petitioner") was convicted for the sexual assault, kidnaping and murder of Kimberly Boyd and sentenced to death. After unsuccessfully challenging his conviction and sentence on direct appeal and in a state post-conviction proceeding, Petitioner filed a seven count federal habeas corpus petition alleging that constitutional error resulted in his conviction and sentence of death.

BACKGROUND

The basic facts were described by the Illinois Supreme Court as follows.

The sexual assault, kidnaping, and murder of 16-year-old Kim Boyd took place during the early morning hours of July 13, 1986. On the night of July 12-13, there was a party at the house of codefendant Curtis Croft attended by defendant, Boyd, codefendants Croft, Kevin Campbell, and Alonzo Woodard, and others, including Anthony Woodard, who testified for the prosecution. There were various comings and goings during that night until around 3 a.m., when Boyd was alone in the house with defendant, Croft, Campbell, and Alonzo and Anthony Woodard. What happened next was revealed by the testimony of Anthony Woodard, by defendant's signed statement given to Assistant State's Attorney Bernard Murray and Chicago police detective Lee Almanza on July 18, 1986, and by the testimony of Dr. Mitre Kalekar, the deputy medical examiner who performed the autopsy on Boyd.

According to defendant's statement, he called Boyd and Anthony into a separate room and angrily asked Boyd why she was having sexual relations with both Anthony and Alonzo Woodard. Boyd made a "smart remark," so

defendant picked up a roll of wallpaper and hit her in the head. Defendant then called Croft, Campbell, and Alonzo Woodard into the room, and defendant and those three forced Boyd to engage in a variety of sexual acts. After they were finished, defendant talked to Croft and Campbell about what to do with Boyd. Defendant said they could not just let Boyd go, even though she said she would not say anything, because if he were a girl he would tell what had happened. Instead, defendant said they would have to kill her because he was "not going to spend no time in jail for a bitch." Defendant then went outside to give a friend's car a jump. As he returned to the house, he saw Croft and Campbell indicating he should keep quiet and drive his car to the back of the house. When defendant did so, he saw Boyd standing blindfolded; Croft, Campbell, and Anthony ~~and~~ Alonzo Woodard were present. After Anthony began walking back toward the front of the house, Croft and Campbell put Boyd in the trunk of defendant's car. Campbell said that he, Anthony, and Alonzo would follow, in a second car, defendant's car containing defendant, Croft, and Boyd. Before driving away, defendant stopped and gave another jump to his friend's car. Defendant then intentionally evaded the following car, explaining that he did so because he did not want the others to be present when Curtis and he killed Boyd.

Anthony Woodard's testimony on behalf of the prosecution varied from defendant's statement primarily by denying that his brother Alonzo and Campbell voluntarily participated in the assault. Anthony testified that defendant and Boyd went into a separate room, that defendant then called him into the room, and that he and Croft joined defendant and Boyd. Defendant ordered Boyd to

take off her pants, and when she began fighting back defendant hit her twice in the jaw. While Anthony sat in a chair, defendant and Croft forced Boyd to have sexual intercourse. Anthony told defendant and Croft to stop but did not try to physically stop them because Croft had a knife with a six-inch blade. Anthony could hear his brother Alonzo and Campbell trying to get into the room, but a chair in front of the door prevented them from entering. Later, defendant opened the door and told Alonzo and Campbell to have sex with Boyd; they did so while Croft held a knife on them. Anthony also said that defendant had a knife in his pocket. Defendant then took Boyd into the bathroom, and when they came out Boyd had cleanser on her face. Defendant and Croft tried to confuse Boyd by telling her she was somewhere else. Defendant then said they would have to kill Boyd. While Croft blindfolded Boyd and took her behind the house, defendant went to get his car. Anthony, Alonzo, and Campbell went to the front of the house where they had parked their car, and Anthony saw defendant giving a car a jump. Defendant then drove his car to the back of the house and in a few minutes drove back to the front of the house with Croft in the car. When Campbell asked where Boyd was, Croft patted the trunk of the car. Alonzo offered to take Boyd home, but Croft said he and defendant would do that and tried to ignore the other three. Alonzo, Anthony, and Campbell tried to follow defendant's car in their own car. When they reached the street where defendant should have turned to take Boyd home, Alonzo, who was driving, blew his horn. But defendant continued on and Alonzo soon lost him in traffic.

Through cross-examination, defendant's attorney tried to discredit Anthony's credibility. Anthony testified that he would try to help out his brother and Campbell, who was

like a cousin to him, but that he was not related to defendant or Croft. Anthony admitted that he had not tried to physically stop the assault, but had merely asked defendant and Croft to stop. Nor did he try to escape from the room and get help, even though at certain times, when Croft was with Boyd, he only would have had to get by defendant, whose knife was in his back pocket and who was smaller, although older, than Anthony. Furthermore, Anthony never approached the police to tell them what had happened, waiting until they came to him.

We have only defendant's statement, and the forensic evidence, to tell us what happened after defendant eluded the other car. Both defendant and Croft expressed some hesitancy about killing Boyd, but in the end decided that they had to do it. Defendant stopped the car in an alley behind the 6000 block of South Carpenter Street in Chicago, and opened the car's trunk, and he and Croft took Boyd out. She told defendant she could "explain," but defendant grabbed a switchblade knife Croft was holding and stabbed her twice in the throat. Croft then took the knife and stabbed Boyd, then defendant did so, and they alternated in this way until Boyd had approximately 40 stab wounds in her head, neck, chest, hands, back, and buttocks. Believing she was not yet dead, defendant and Croft got into the car and defendant drove over her three times. They got out of the car, confirmed that she was finally dead, and drove away. Dr. Kalekar testified concerning the multiple stab wounds, bruises, broken bones, and other wounds to the body consistent with being run over and dragged by a car.

Boyd's body was found later that morning and a police investigation was begun, leading to the arrest of defendant and Curtis Croft on July 17, 1986, at defendant's home. At

the Area 3 Violent Crimes police station during the night of July 17-18, Assistant State's Attorney Murray and various detectives questioned defendant, Croft, Campbell, Anthony and Alonzo Woodard, and two girls who had attended the party the night of July 12-13. Initially, defendant denied involvement in the murder, although he admitted being at the party. When Assistant State's Attorney Murray told defendant this was inconsistent with what other witnesses had said, defendant asked what Croft had said. Croft was brought into the room and recounted the statement he had made to the police earlier. Defendant then made both an oral and a court-reported statement . . .

On August 6, 1986 Petitioner was indicted, along with several co-defendants, for the sexual assault, kidnaping, and murder of Kimberly Boyd. Prior to trial, Petitioner moved to quash his arrest, suppress his confession, and sever his trial. The Court denied the motions to quash and suppress and granted the motion to sever, resulting in a simultaneous bench-jury trial. On May 12, 1987 a jury convicted Petitioner of aggravated kidnaping, aggravated criminal sexual assault, and murder. Having accepted a waiver of a capital jury sentencing, the trial judge conducted a sentencing hearing, where he determined that defendant was 18 years old at the time of the murder, that he had killed the victim during the course of the felony, and, therefore, that he was eligible for the death penalty. After hearing evidence in aggravation and mitigation, the judge also determined that there were no mitigating factors sufficient to preclude the imposition of the death penalty, and sentenced defendant to death, along with 45 years on the aggravated criminal sexual assault conviction and 10 years on the aggravated kidnaping conviction.

See People v. Henderson, 142 Ill.2d 258, 273-77, 568 N.E.2d 1234, 1242-44, 154 Ill. Dec. 785, 793-95 (1990), *cert. denied,* 502 U.S. 882, 116 L. Ed. 2d 189, 112 S. Ct. 233 (1991).

On direct appeal to the Illinois Supreme Court, Henderson raised over 20 issues regarding his conviction and sentence. The Illinois Supreme Court ultimately affirmed Henderson's convictions and death sentence, but reduced the sentence for aggravated criminal sexual assault to 30 years. *People v. Henderson,* 142 Ill.2d 258, 568 N.E.2d 1234, 154 Ill. Dec. 785 (1990), *cert. denied,* 502 U.S. 882, 116 L. Ed. 2d 189, 112 S. Ct. 233 (1991). On June 23, 1993, the Circuit Court of Cook County dismissed the Petitioner's post-conviction petition, which challenged both his conviction and sentence of death, without conducting an evidentiary hearing. The Illinois Supreme Court affirmed the dismissal on January 25, 1996. *People v. Henderson,* 171 Ill. 2d 124, 662 N.E.2d 1287, 215 Ill. Dec. 147, *cert. denied,* 519 U.S. 953, 136 L. Ed. 2d 259, 117 S. Ct. 369 (1996).

In his petition for habeas relief, Petitioner claims that: (1) the prosecution discriminated against blacks in using its peremptory challenges in violation of *Batson;* (2) defense counsel was ineffective in failing to present corroborating medical evidence, evidence of physical coercion with the motion to suppress his confession; (3) he was denied a fair trial as a consequence of cumulative trial errors including the submission of Petitioner's statement relating to an intent to commit another murder, the prosecutor eliciting testimony of a prior consistent statement by a state witness, the prosecutor making numerous improper statements in his closing intended to inflame juror emotions, and the prosecutor making an improper

statement about the lack of fingerprint evidence; (4) he did not knowingly and intelligently waive the right to a sentencing jury because he was not informed that jury would decide both the eligibility and mitigation/aggravation phases of sentencing and that a sentencing jury must be unanimous to impose the death penalty ("one-juror rule"); (5) he was denied a fair death penalty hearing by the trial judge's refusal to consider mitigating evidence of his traumatic childhood and troubled family history; (6) defense counsel was ineffective in failing to investigate available mitigating and aggravating evidence prior to the innocence-guilt phase in order to ensure a cohesive strategy for the sentencing phase, request the appointment of a psychologist to do a full psychological evaluation and testify on Petitioner's behalf (instead of relying upon an unqualified social worker), and investigate and present substantial explanatory and humanizing mitigating evidence (including, but not limited to, evidence that at the time of the crime the Petitioner was under the influence of an extreme mental or emotional disturbance); and (7) he was denied due process by the trial court's use of the rehabilitation standard in sentencing him to death.

LEGAL STANDARDS

Through the mechanism of habeas corpus, a federal court may vacate a state prisoner's conviction or sentence where that prisoner is being held in violation of the United States Constitution or other federal laws or treaties. *See* 28 U.S.C. § 2254; *McGowan v. Miller,* 109 F.3d 1168, 1172 (7th Cir. 1997). Traditionally, state court legal conclusions, including mixed questions of law and fact, are reviewed de novo; however, that standard has been tempered by the Antiterrorism and Effective Death Penalty Act's

("AEDPA's") deferential standards. *Sanchez v. Gilmore,* 189 F.3d 619, 623 (7th Cir. 1999), *cert. denied,* 529 U.S. 1089, 146 L. Ed. 2d 645, 120 S. Ct. 1724 (2000).[1] A federal court may only grant a prisoner's § 2254 petition if the state court's "adjudication of the claim – (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or – (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented . . . " 28 U.S.C. § 2254(d). *See also Weeks v. Angelone,* 528 U.S. 225, 120 S. Ct. 727, 734, 145 L. Ed. 2d 727 (2000); *Coleman v. Ryan,* 196 F.3d 793, 795-96 (7th Cir. 1999). In addition, determinations of factual issues made by the state court are presumed to be correct; the petitioner has the burden of rebutting them by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

The U.S. Supreme Court only recently addressed the new standard.

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[1] Petitioner has raised some claims regarding the applicability of certain provisions in Chapter 154 of the Antiterrorism and Effective Death Penalty Act, as Petitioner maintains Illinois does not meet the relevant standards. Petitioner appears to have a point. *See Pitsonbarger v. Gramley,* 141 F.3d 728, 732 (7th Cir. 1998), *cert. denied,* 525 U.S. 984, 142 L. Ed. 2d 402, 119 S. Ct. 448 (1998). However, this claim does not affect our analysis, as Petitioner's petition was filed after the effective date of the Act. Both Chapters 153 and 154 of the Antiterrorism and Effective Death Penalty Act ("Act") unquestionably apply to cases filed after the Act took effect (April 24, 1996). *See Williams v. Taylor,* 529 U.S. 420, 146 L. Ed. 2d 435, 120 S. Ct. 1479, 1486 (2000); *Lindh v. Murphy,* 521 U.S. 320, 117 S. Ct. 2059, 2067, 138 L. Ed. 2d 481 (1997). In addition, the relevant standard of review is the same, as Chapter 154 incorporates the standards of § 2254(a), § 2254(d), and § 2254(e). *See* 28 U.S.C. § 2264(b).

Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 146 L. Ed. 2d 389, 120 S. Ct. 1495, 1523 (2000). "[A]n unreasonable application of federal law is different from an incorrect or erroneous application of federal law." *Id.* 120 S. Ct. at 1522. "[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of the clearly established federal law was objectively unreasonable." *Id* . at 1521 (rejecting the "all reasonable jurists" standard). The Supreme Court's formulation does not appear to be significantly different than the formulation the Seventh Circuit has developed in its AEDPA cases. *See, e.g., Sanchez,* 189 F.3d at 623 ("[T]he 'criterion for assessing the reasonableness of a state court's application of Supreme Court case law, pursuant to § 2254(d)(1), is whether the determination is at least minimally consistent with the facts and circumstances of the case.' ") (quoting *Sweeney v. Park,* 113 F.3d 716, 718 (7th Cir. 1997)); *Hall v. Washington,* 106 F.3d 742, 748-49 (7th Cir.), *cert. denied,* 522 U.S. 907, 139 L. Ed. 2d 190, 118 S. Ct. 264 (1997) ("The statutory 'unreasonableness' standard allows the state court's conclusion to stand if it is one of several equally plausible outcomes"). As Judge Evans succinctly put it "the upshot of all this is that federal review is now

severely restricted; the fact that we may think certain things could have been handled better by the state trial judge or by the prosecuting attorney or by a state reviewing court means very little." *Sanchez,* 189 F.3d at 623.[2]

Further, a federal court may not review the merits of claims raised in a § 2254 petition unless the petitioner has (1) exhausted all the remedies available to him in state court; and (2) fairly presented his federal claims in state court first. *McGowan,* 109 F.3d at 1172. To exhaust a claim, "state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel,* 526 U.S. 838, 119 S. Ct. 1728, 1732, 144 L. Ed. 2d 1 (1999). In sum, a petitioner can procedurally default a claim by completely failing to raise the claim in the state court system or where the state court has declined to address the merits of the claim because of petitioner's failure to comply with a state procedural rule or where petitioner failed to properly appeal his claim in the state court system. *See U.S. ex rel. Johnson v. Tally,* 47 F. Supp. 2d 943, 947 (N.D. Ill. 1999).

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[2] During the course of this court's analysis, we will, as always, utilize Seventh Circuit cases for guidance. However, under the AEDPA standard, which focuses on the Supreme Court's holdings, the relevance of our appellate court's precedent may vary. The Seventh Circuit's AEDPA cases are of course dispositive (e.g., the Seventh Circuit concluding that a certain state court ruling is contrary to relevant Supreme Court precedent). Pre-AEDPA cases also provide guidance. For example, if the Seventh Circuit concluded a certain state ruling passed muster under the prior, higher standard, it would be difficult to conclude a similar ruling was "unreasonable" under the new, more deferential standard. However, it would appear that the contrary may not be automatically true.

If a petitioner has procedurally defaulted a claim, a federal court cannot reach the merits of that claim unless the petitioner demonstrates (1) cause for and actual prejudice arising from failing to raise the claim as required, or (2) that enforcing the default would lead to a "fundamental miscarriage of justice." *Steward v. Gilmore,* 80 F.3d 1205, 1211-12 (7th Cir. 1996) (quoting *Wainwright v. Sykes,* 433 U.S. 72, 87, 53 L. Ed. 2d 594, 97 S. Ct. 2497 (1977)). The fundamental miscarriage of justice exception requires a claim that the petitioner be actually innocent of the crime. *Id.* 80 F.3d at 1212. *See also Britz v. Cowan,* 192 F.3d 1101, 1103 (7th Cir. 1999), *cert. denied,* 529 U.S. 1006, 146 L. Ed. 2d 223, 120 S. Ct. 1274 (2000) ("Waiver will be forgiven, however, if the petitioner can show that he was 'actually' and not merely 'legally' innocent of the criminal charges against him.")

The availability of an evidentiary hearing has also been restricted under AEDPA:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no

> reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2). "[A] failure to develop the factual basis of a claim is not established unless there is a lack of diligence, or some other greater fault, attributable to the prisoner or the prisoner's counsel." *Williams,* 120 S. Ct. at 1488. "Diligence for purposes of the opening clause depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court. . . . " *Id.* at 1490 ("Diligence" requires, at minimum, that the prisoner seek an evidentiary hearing in state court). A prisoner who has been diligent will be excused from the provision's stringent requirements. *Id.* at 1491.

DISCUSSION

A. Batson Claim

Petitioner maintains that the Illinois courts erred in concluding that he had not established a prima facie case under *Batson.* Petitioner notes the following: (1) the Illinois court improperly failed to consider the results of the first venire (2 out of 3 of prosecutor's peremptory challenges excluded blacks); (2) 6 out of 10 of prosecutor's subsequent peremptory challenges were used to exclude blacks; (3) the prosecution's use of peremptory challenges against blacks was grossly disproportionate to number of blacks on venire (30%); (4) blacks made up only 21% of jury; (5) the Illinois courts used the wrong standard ("systemic exclusion" vs. "all relevant circumstances"); (6) Illinois court did not properly consider that Petitioner was black; and (7) Illinois court did not properly consider similarities between excluded blacks versus accepted

white jurors.[3] The Respondent maintains that the claim is meritless, as the Illinois Supreme Court reached the proper result after applying the proper legal standard.

1. Legal Standard

There is no doubt that the Supreme Court has clearly established that a state denies a defendant equal protection under the law when it puts him on trial before a jury from which members of his race have been deliberately excluded because of their race. *See Batson v. Kentucky,* 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986). As such, a prosecutor is forbidden to "challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89. Harm from such conduct goes beyond the defendant and the excluded juror, and extends to the community in diminished public confidence in the fairness of our judicial system. *Id.* at 87. To establish a prima facie case of discrimination in the selection of petit jurors based on the prosecutor's exercise of peremptory challenges, the defendant must show: (1) that he is a member of a cognizable racial group; (2) that the prosecutor used peremptory challenges to remove members of defendant's racial group from the venire; and (3) "that these facts and any other

[3] Petitioner also argues that the Illinois Supreme Court decision was not on the merits because they employed a deferential standard of review. This claim is baseless. By petitioner's reasoning, a jury verdict, which was reviewed deferentially and affirmed by the appellate court on a sufficiency of the evidence claim, would not be an "on the merits" determination.

relevant circumstances raise" an inference that the prosecutor used his challenges to exclude potential jurors based on their race. *Id.* at 96. The defendant is entitled to rely on the fact that peremptory challenges enable "those to discriminate who are of a mind to discriminate." *Id.* (internal cite omitted). In deciding whether a defendant has established a prima facie case, the trial court must consider all relevant circumstances, including such matters as a "pattern" of strikes against black jurors in the venire and the prosecutor's questions and statements in voir dire and in exercising his challenges. *Id.* at 96-7. "We have confidence that trial judges, experienced in supervising voir dire, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case. . . . " *Id.* at 97. Once the defendant establishes a prima facie case, the burden shifts to the state to present a race neutral explanation for the challenges to black jurors. *Id.* "Batson is violated if even a single potential juror is excluded for an impermissible reason." *Coulter v. Gilmore,* 155 F.3d 912, 919 (7th Cir. 1998) (citing *J.E.B. v. Alabama ex rel. T.B.,* 511 U.S. 127, 142 n.13, 128 L. Ed. 2d 89, 114 S. Ct. 1419 (1994)).

2. State Court Decision

The Illinois Supreme Court rejected Petitioner's *Batson* claim after a lengthy analysis.[4]

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[4] For ease of analysis and the reader's benefit, the state court's discussion of each issue will be presented essentially in its entirety. State court citations and other text not relevant to our review may be omitted.

Defendant first challenges his convictions on the basis that, in selecting the jury which convicted him, the prosecution purposefully discriminated against black venire members when exercising peremptory challenges, and thus violated the equal protection clause of the fourteenth amendment (U.S. Const., amend. XIV), as construed in *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69. The Supreme Court in *Batson* held that the prosecution denies a defendant his rights under the equal protection clause if the prosecution exercises peremptory challenges so as to purposefully exclude members of a defendant's race from the jury. In order to establish a *Batson* claim, a defendant has to first establish a prima facie case by showing that he is a member of a cognizable racial group and that the prosecution exercised peremptory challenges to exclude from the jury venire members who share his race, and by pointing to any other relevant circumstances that raise an inference of purposeful discrimination by the prosecution . . . In this case, the issue is whether the trial court erred in ruling that defendant had not established a prima facie case.

After a jury of 12 and 2 alternate jurors had been sworn, but before opening statements had been made, defense counsel moved for a mistrial on the basis that the prosecution had systematically excluded black venire members from the jury through the exercise of peremptory challenges. Defense counsel noted that of the nine venire members peremptorily challenged by the prosecution, six were black (appellate defense counsel acknowledges that the prosecution actually used ten, not nine, peremptory challenges). Defense counsel further noted that the jury chosen consisted of four white males, six white females (two of whom were apparently Hispanic), and two black

females. The two alternate jurors were a black male and a white female. To buttress his motion, defense counsel also referred to the prosecution's exercise of peremptory challenges during the aborted voir dire of the first venire called in this case: Of the three peremptory challenges exercised by the prosecution during voir dire of this first venire, two were exercised against blacks. (Voir dire of the first venire proceeded only as far as the selection of a panel of four jurors, at which time the entire venire and the four jurors chosen from it were dismissed by the trial judge because the judge, without objection from counsel, excused one of the four chosen jurors, the only black on that panel, after finding that the juror would not be able to fully concentrate on the case, and because the defense refused to accept the broken panel of jurors.) In framing his *Batson* claim on appeal, defendant has also included those three peremptory challenges exercised by the prosecution during voir dire of the first venire. The trial court reserved ruling on defendant's motion for a mistrial until the morning of the next day.

At that time one juror, apparently one of the two Hispanic females, who had told the trial judge that she would be unable to concentrate on the trial owing to serious personal problems, was brought into chambers to repeat her concerns in the presence of the lawyers. The judge excused this juror without objection. The first alternate, a black male, then became a juror.

The judge then denied defendant's motion for a mistrial, finding that the prosecution had not systematically excluded blacks from the jury and therefore would not have to explain the reasons for its challenges, and thereby implicitly finding that defendant had not made a prima facie case of purposeful discrimination as required

by *Batson*. In announcing its ruling, the court documented the jury selection procedure that had been used, the racial makeup of the jury, and the peremptory challenges used by the prosecution.

Because the record is unclear as to certain facts, in evaluating defendant's claim of purposeful discrimination, we have had to make our own review of the record to determine the number of challenges exercised by the parties and the races of those challenged by the prosecution. We have found the following pertinent facts, construing any ambiguity in the record against defendant, who had the burden of preserving the record . . . The jury selection procedure used was to seat panels of venire members (three panels were seated, numbering 14, 14, and 12), have the trial judge inquire of them initially, and then allow inquiry first by the defense and then by the prosecution as to the first panel, and first by the prosecution and then by the defense as to the second and third panels. Following the questioning of each panel, the defense and the prosecution gave the trial judge a list of those venire members whom they challenged, without revealing these challenges to the opposition. This procedure was used on the recommendation of defense counsel.

Of the 40 venire members examined, 3 were excused for cause. Prosecution and defense were each allotted 14 peremptory challenges; the prosecution used 10, while the defense used 13. Of the 10 peremptory challenges exercised by the prosecution, 6 were exercised against blacks. Of the 27 venire members accepted by the prosecution, 5 were black. After the defense exercised its challenges, 3 of the 14 venire members chosen to serve as jurors or alternates, and 3 of the 12 jurors who convicted defendant (the black alternate became a juror after the first day of

testimony), were black. The relevant racial statistics are thus: 30% of the pool of 37 venire members not challenged for cause was black, compared to black representation of 19% among the 27 venire members accepted by the prosecution; also, 60% of the State's 10 peremptory challenges were exercised against the black 30% of the venire, and 21% of the 14-member jury was black.

In determining whether the trial judge correctly ruled that defendant failed to establish a prima facie case of purposeful discrimination, we constrain our inquiry in certain ways: We consider the voir dire of the second venire only; we disregard any racial distinction between Hispanic and white venire members; and we consider the jury as a group of 14 which includes the 2 alternates selected, not as a jury of 12.

Contrary to defendant's urging, we decline to consider the prosecution's peremptory challenges to members of the first venire, before that venire was dismissed. As stated, a panel of four jurors was initially selected from the first venire, and in selecting this panel the prosecution exercised three peremptory challenges two of which were against blacks. We decline to consider these challenges because we recognize that attorneys approach the selection of a jury as one entire process, during which an attorney individually assesses each venire member's character, views, and impartiality, and then decides which venire members to challenge and which to accept while reserving a sufficient number of challenges for use against those venire members who have not yet been questioned. Given the complex strategic nature of the jury selection process and the exercise of peremptory challenges, we find that the facts involved in the selection of a single panel of four jurors are not probative of whether the prosecution

purposefully discriminated in the selection of a full jury. For the same reason, we reject the State's approach of analyzing the racial balance of the prosecution's challenges by separately analyzing its challenges to each of the three panels of venire members seated from the second venire, as well as its challenges as a whole.

We disregard the racial distinction between Hispanic and white venire members accepted by the prosecution, a distinction which the trial judge apparently relied on in part, for he mentioned the presence of two Hispanics on the jury, making a total of "five minority people." Because defendant is black, the only relevant racial distinctions among venire members in this case are black and non-black. In establishing a prima facie case of prosecutorial discrimination against venire members of a defendant's race, a defendant can only rely on the prosecution's exercise of "peremptory challenges to remove from the venire members of the defendant's race" (*Batson*, 476 U.S. at 96, 106 S. Ct. at 1723, 90 L. Ed. 2d at 87; . . .). By the same token, we find that, in determining whether a prima facie case is established, it is irrelevant whether the prosecution accepted some venire members who belonged to a racial minority other than that of defendant.

Because of the method of jury selection used in this case, we include in our review not only the 12 original jurors, but also the 2 alternate jurors. The jury was selected from three panels of venire members, numbering 14, 14, and 12. By the time the third panel was called, 10 jurors had been selected. Thus, when the final panel of 12 was questioned, 2 jurors and 2 alternates were needed. Once again, the prosecution and the defense simultaneously submitted to the trial judge their challenges. The result was that 8 of these 12 venire members were

challenged and 4, the exact number of jurors needed, were accepted. Of the four accepted, the first two who had been called became jurors, while the other two became the first and second alternates. Given this procedure of selecting the alternates from the same venire panel as the jurors, not from a separate panel, and given the fact that it was impossible for the prosecution to know, at the time it exercised its challenges, that the black male venire member whom it accepted would not initially be seated as a juror, we find the races of the two alternate jurors to be relevant in deciding defendant's claim. (The black male, Juror M, was the fifth venire member called; the defense had three peremptory challenges remaining and the prosecution had eight; if the prosecution had wanted to minimize the likelihood of Juror M's becoming a juror, as opposed to an alternate juror, yet had been hesitant to strike him, it would not have challenged any of the four venire members who preceded Juror M, hoping the defense would not use all three of its challenges against three of the first four venire members; but in fact the prosecution challenged the third venire member, a white female.)

With this understanding of the factual boundaries of our review, we consider the arguments of the parties. The first decision we must make is whether defendant is able to present a *Batson* claim to us, for the State asserts that this claim was waived because defendant's objection to the prosecution's use of peremptory challenges was untimely. The State is correct; defendant waived his *Batson* claim by voicing his objection and moving for a mistrial in an untimely manner, not doing so until after the jury had been sworn ... Nonetheless, we consider defendant's *Batson* claim because, for its part, the State's right to raise

defendant's waiver was itself waived when the prosecution neglected to argue the untimeliness of defendant's motion at the time the motion was made, and instead attacked the motion's merits . . .

On the merits of his claim, defendant contends that the numerical racial imbalance of the prosecution's peremptory challenges, 6 of 10 being exercised against blacks, alone raises an inference of purposeful discrimination and establishes a prima facie case. Defendant cites cases in which the appellate court found a prima facie case established by similar numbers . . . Besides the black-nonblack ratio of prosecution challenges, defendant argues that the following facts create an inference of purposeful discrimination: The prosecution struck all six blacks without asking them any questions probative of their backgrounds or impartiality, striking two of the six without asking them any questions, and striking the other four after asking such general questions as whether they could give the State a fair trial; the challenged blacks were heterogeneous in all respects except race; the only respect in which the challenged blacks could be distinguished from the white jurors was by race; and defendants in Cook County frequently claim that the prosecution systematically excluded blacks from their juries. Defendant discounts the relevancy of the fact that three blacks served on his jury, arguing that the issue is whether the prosecution discriminated against any of the six blacks it struck, not whether it failed to discriminate against the three black jurors.

Responding to defendant's arguments, the State reminds us that a prima facie case of purposeful discrimination cannot be established merely by the number of blacks stricken by the prosecution . . . , and mentions other factors which this court has found relevant

factors which this court has found relevant in ruling on a *Batson* claim. Also, the State makes the odd assertion that when each panel of venire members is examined individually it becomes apparent that "the prosecution exercised practically the same number of peremptory challenges to remove whites as blacks"; we have already rejected the method of analyzing *Batson* claims by fragmenting the jury selection process. Next, the State points out that the prosecution accepted at least one black from each panel and argues that this shows the prosecution did not exclude as many blacks as it could have done, a relevant factor (*see, e.g., United States v. Montgomery* (8th Cir. 1987), 819 F.2d 847, 851). In addition, the State believes that any inference of discrimination is undercut by the fact that 25% of the jurors, 3 of 12, were black, about the same as the percentage of the Cook County population 18 years old and older.

The State also contends that more than race distinguishes the stricken black venire members from white venire members accepted by the prosecution. Whereas many of the accepted white venire members were crime victims, one had a friend who had been raped, one had been a parole officer, one was training to be a policeman, and others knew lawyers and police officers, five of the six stricken black venire members did not share these characteristics. The State also claims that several of the stricken blacks had characteristics which the prosecution may have considered to be unfavorable; we find the factual support for this latter claim to be extremely weak. Additionally, the State claims the stricken blacks were similar in respects other than race, yet supports this claim merely by stating that most of them (in reality only three of six) lived alone and were single. The State also notes that the record does

not evidence the age of each venire member, a possibly legitimate distinguishing factor. The State denies that the number of times defendants in Cook County have claimed prosecutorial discrimination during jury selection is relevant; while the number of such claims proved might be relevant, defendant did not provide that information. On the other hand, one relevant fact in this case is that the victim and most of the witnesses are black, as is defendant, tending to negate a discriminatory motive by the prosecution . . . As a final point, the State mentions this court's previous holding that a trial court's finding that a defendant has not established a prima facie *Batson* claim will be overturned only if against the manifest weight of the evidence . . . , and the Supreme Court's comment in *Batson* that a reviewing court should give "great deference" to a trial court's finding on intentional discrimination because it largely depends on an assessment of credibility (*Batson*, 476 U.S. at 98 n. 21, 106 S. Ct. at 1724 n. 21, 90 L. Ed. 2d at 89 n. 21).

Defendant responds to these arguments by asserting that, though the State claims that one possible reason for the prosecution's striking five of the six excluded black venire members is that they lacked characteristics the prosecution might have seen as favorable, some of the accepted nonblack jurors likewise lacked these characteristics (significantly, defendant limits his argument only to nonblack jurors, excluding from his analysis those nonblack venire members accepted by the prosecution but stricken by defendant); the State fails to provide credible facts to support its argument that any stricken black venire members had characteristics unfavorable to the prosecution; and the characteristics of being single and living alone, cited by the State as a nonracial difference

between the stricken blacks and the accepted non-blacks, not only were not possessed by three of the stricken blacks, but in fact were possessed by two white jurors. Defendant disputes that the fact that defendant, the victim, and many witnesses were black militates against the prosecution's possessing a discriminatory motive. For one thing, discrimination is illogical – if the prosecution was "'of a mind to discriminate'" (*Batson*, 476 U.S. at 96, 106 S. Ct. at 1723, 90 L. Ed. 2d at 87, quoting *Avery v. Georgia* (1953), 345 U.S. 559, 562, 73 S. Ct. 891, 892, 97 L. Ed. 1244, 1248), it may have concluded that black jurors would be less likely to convict a black defendant even if the murder victim was also black. Furthermore, defendant thinks the two most crucial prosecution witnesses were a white policeman and a white assistant State's Attorney, both of whom testified to defendant's questioning on the night of July 17, 1986, when he confessed. Defendant also denies that the trial court's finding of no prima facie case should be given any deference by us, for the quotation the State took from *Batson* regarding the deference to be given to a trial court's ruling referred to a trial judge's analysis of neutral explanations offered by the prosecutor, at which time a trial judge assesses the prosecutor's credibility (*Batson*, 476 U.S. at 98 n. 21, 106 S. Ct. at 1724 n. 21, 90 L. Ed. 2d at 89 n. 21).

The standard of review we apply, in determining whether the trial judge erred in ruling that defendant had failed to establish a prima facie case of purposeful prosecutorial discrimination against black venire members, is whether this ruling is against the manifest weight of the evidence. . . . In making this determination, because defendant has first shown he is a member of a cognizable racial group and members of the same racial group were

peremptorily challenged by the prosecution (*Batson*, 476 U.S. at 96, 106 S. Ct. at 1723, 90 L. Ed. 2d at 87 (first element of a prima facie case)), we will consider all facts which reasonably indicate or refute purposeful discrimination by the prosecution, not just the number of challenges exercised against black venire members . . . Other factors from which an inference of discrimination can be drawn are: a disproportionate number of strikes against blacks, especially when so disproportionate as to present a "pattern" . . . ; the level of black representation on the jury as compared to the venire . . . ; whether the stricken black venire members are heterogeneous in every respect except race . . . ; the prosecutor's questions during voir dire and statements when exercising challenges . . . ; and the race of the defendant, victim, and witnesses . . .

Viewing all the relevant facts of this case, we cannot say that the trial court's finding that defendant failed to establish a prima facie case is against the manifest weight of the evidence. The only factor strongly suggesting purposeful discrimination is the disproportionality of the prosecution's challenges to black as opposed to non-black venire members; 6 of the prosecution's 10 peremptory challenges, or 60%, were used against blacks, who constituted only 30% of the venire members not excused for cause. Yet this disproportionality is not so severe that it creates a "pattern." All other relevant factors tend to refute the idea of discrimination, weigh neutrally in the balance, or mildly tend to suggest discrimination.

A factor that tends to refute an inference of discrimination, or whose value is, at most, neutral, is that this black defendant was found guilty of raping and murdering a young black woman. Despite defendant's view that the illogical nature of discrimination makes a crime's racial

character irrelevant, we have to employ logic in our analysis; thus, we find that, when deducing the existence of a prima facie case of purposeful discrimination, whether or not the defendant and the defendant's victim are members of the same cognizable racial group is a relevant factor . . . In a case where the defendant is black and the victim is white, we recognize, at the prima facie stage of establishing a *Batson* claim, that there is a real possibility that the prosecution, in its efforts to procure a conviction, will use its challenges to secure as many white jurors as possible in order to enlist any racial fears or hatred those white jurors might possess. On the other hand, in a case where both the defendant and victim are black, their racial characteristics do not warrant an inference, at the prima facie stage, that the prosecution discriminated against venire members who were black. Furthermore, we refuse to conclude that the fact that the defendant is black supports an inference of prosecutorial discrimination regardless of the victim's race.

Nor do we infer a discriminatory motive by the prosecution from the fact that the assistant State's Attorney who elicited defendant's confession and the police officer who testified to the course of the murder investigation were white. In fact, we believe the "star" prosecution witness was Anthony Woodard, the black youth who provided the only evidence, other than defendant's confession, that defendant sexually assaulted Boyd and drove off with her in the trunk of his car in the early morning hours of July 13, 1986.

In this case, the heterogeneity of the stricken black venire members is a neutral factor. Our review of the record shows that five of the six were nondiverse in respects other than race. Five of the six were single and had

a college education; three of these five lived alone and the other two lived with immediate family. The sixth stricken black venire member was separated from her husband, had three daughters ranging in age from 22 to 30, apparently lived alone, and was unemployed, as were two of her three daughters. While these six venire members did not share identical backgrounds, and while it is true that the prosecution accepted white venire members who were single and lived alone, at this stage of a *Batson* claim we are only concerned with whether the stricken black venire members shared any characteristics other than race; it is not our role to search for possible reasons for the prosecution's strikes or for similarities between stricken black and accepted white venire members.

Another neutral factor here is the number and nature of the questions the prosecutor asked stricken black venire members and the statements the prosecutor made when exercising challenges. True, the prosecutor failed to ask any probative questions about the stricken black venire members' backgrounds or personalities; but, the fact is, the prosecutor failed to ask such probative questions of any venire members, black, white, or Hispanic. With one exception, the prosecutor limited his questions to general "fair trial" kinds of questions; the one exception was the prosecutor's asking a female black venire member, whom the prosecution accepted and who became a juror, about an attack on her husband and his crippling on-the-job injury. When exercising its challenges, the prosecution made no statements.

The final relevant factor is the level of black representation on the jury as compared to the venire, and here there is some support for an inference of discrimination. Of the 37 people not excused for cause, 11 were black, or

30%; of the 14-member jury there were 3 blacks, or 21%; and of the 27 venire members accepted by the prosecution, 5 were black, or 19%. Thus, there was a slight disparity between the level of black representation on the venire, 30%, and that on the jury, 21%.

In sum, considering all the relevant factors, only two factors (the percentage of blacks on the venire not excused for cause compared to the percentage of the prosecution's peremptory challenges exercised against and as compared to the percentage of blacks on the jury) tend slightly to suggest purposeful discrimination, while the others are either neutral or tend to refute such a suggestion. Therefore, we cannot say the trial court's finding that defendant failed to establish a prima facie case of purposeful discrimination by the prosecution's exercise of peremptory challenges is against the manifest weight of the evidence.

See 142 Ill.2d at 277-91, 568 N.E.2d at 1244-50, 154 Ill. Dec. at 795-80.

3. Analysis

At the outset, we note the Illinois Supreme Court cited *Batson* and recited the correct elements of a prima facie case. The question appears to be whether the Illinois court reasonably applied the *Batson* standard or reached any conclusions contrary to *Batson*.

Two of Petitioner's claims can be dispensed with quickly. First, given that Petitioner's primary emphasis is on the pattern of strikes, the first venire is of limited, if any, significance. If it is considered, the percentage of challenges against blacks changes little, from 60% (6 of 10) to 61.5% (8 of 13). Second, a review of the record indicates

that the trial court's reference to "systemic exclusions" appears to be a poor word choice rather than the application of the wrong standard. *See generally McCain v. Gramley,* 96 F.3d 288, 293-94 (7th Cir. 1996). Given the newness of *Batson* at the time of Petitioner's trial, the judge might still have been using the "old" vocabulary. The misstatement may also have been prompted by defense counsel and the prosecutor's use of the term in discussing how *Batson* altered *Swain.* (*See* State Criminal Trial Transcript at pp. 1110-1114.) While it is unclear what standard the state trial judge used, it appears, at bottom, that the trial judge considered the composition of the jury, the pattern of strikes, and the other circumstances that he observed during the jury selection process through the prism of his trial experience. (*See* State Criminal Trial Transcript at pp. 1340-43.) More significantly, however, any confusion as to the standard the trial court applied drops out because the Illinois Supreme Court clearly acknowledged the *Batson* standard. Moreover, the Illinois Supreme Court specifically stated that it would "consider all facts which reasonably indicate or refute purposeful discrimination. . . . " *See* 142 Ill. 2d at 287, 568 N.E.2d at 1248, 154 Ill. Dec. at 799. This statement indicates the court, while using somewhat different verbiage, essentially applied the *Batson* "all relevant circumstances" standard.

We will next examine the Illinois Supreme Court's handling of the "pattern" of challenges. We note at the outset that the Illinois court correctly concluded that a percentage of strikes against black jurors in a higher percentage than their representation on the entire venire is not dispositive. *See McCain,* 96 F.3d at 292. This result flows directly from *Batson,* which instructed that a disproportionate pattern of strikes was one factor to

consider in assessing all relevant circumstances. As to the actual numbers, blacks made up 30% of the venire, the prosecution used 60% of their peremptory challenges against blacks (6 of 10, with 4 unused), blacks made up 21% of the initial jury (3 blacks (including one alternate) in the original panel of 12 jurors and 2 alternates), and the jury that ultimately convicted the Petitioner was 25% black (3 of 12).

In *McCain,* the Seventh Circuit, applying the AEDPA standard, concluded that a prima facie case under *Batson* had not been established. While blacks were stricken at a much higher percentage than their representation in the venire (40% of challenges but only 16.66% of the venire), the total number of strikes was not significant (2), the number of strikes was not against a significant number of the black venire persons as a whole, and the final jury had approximately the same percentage of blacks as the venire. *Id.* These facts are comparable to those in Petitioner's case, which makes it difficult to conclude the state court's analysis was "unreasonable" in addressing the pattern of strikes. Cases going the other way typically have far more egregious patterns of strikes. *See generally Mahaffey v. Page,* 162 F.3d 481 (7th Cir. 1998), *cert. denied,* 526 U.S. 1127, 119 S. Ct. 1786, 143 L. Ed. 2d 814 (1999) (all blacks on venire excluded); *Coulter v. Gilmore,* 155 F.3d 912 (7th Cir. 1998) (90% of strikes against black venire members). In sum, the state court's analysis of the pattern of strikes, in an [sic] of itself, does not warrant ordering a new *Batson* hearing.

Petitioner's claim that the state court inappropriately discounted his race, because the victim and key witness were also black, is ultimately unpersuasive. Petitioner is correct that *Batson* does not simply focus upon black

defendants and white victims and the risk a prosecutor might seek an all-white jury to take advantage of possible racial animus to obtain a conviction, but also addresses the stereotype that a black juror cannot fairly and objectively assess the evidence against a black defendant. Petitioner is also correct that some of the state court's comments could be construed as viewing *Batson* as only significant in "racially sensitive" cases.

Nonetheless, while the fact that a defendant is a member of a minority group is clearly part of a prima facie case under *Batson* (which the Illinois court properly acknowledged), it is obviously not dispositive by itself or the rest of the *Batson* "all relevant circumstances" formulation would be redundant. Moreover, the Supreme Court itself has stated that race may weigh differently in different circumstances. *United States v. Armstrong,* 517 U.S. 456, 468, 134 L. Ed. 2d 687, 116 S. Ct. 1480 (1996) (significance of strike against minority venire member may vary depending on relative number of minority persons in venire). *See also Mahaffey,* 162 F.3d at 485 (noting special racial sensitivity issues). The state court's conclusion that Petitioner's race was not a significant factor, given the lack of special racial sensitivity in the case and the presence of other blacks in the venire and on the jury, does not appear to be contrary to established Supreme Court precedent or, in and of itself, an unreasonable application of the relevant legal principle.

Petitioner's last contention is the most troubling – that the state court specifically refused to consider similarities between excluded blacks and accepted whites in assessing whether Petitioner had established a prima facie case. Instead, the state court chose to focus on whether the excluded blacks shared characteristics with each other

other than race. The state court specifically noted that the excluded black venire persons and some of the accepted white jurors shared some characteristics. *See* 142 Ill. 2d at 290, 568 N.E.2d at 1250, 154 Ill. Dec. at 801.

The question becomes whether *Batson's* admonition to consider "all relevant circumstances" requires the courts to consider the similarities between excluded blacks versus accepted white jurors in assessing whether a defendant has established a prima facie case. If so, the Illinois Supreme Court's decision is contrary to or unreasonably applies the *Batson* test and cannot stand.

Neither side has cited a Supreme Court case addressing this precise issue. The Seventh Circuit has concluded that a court should consider this factor in assessing whether a defendant has established a prima facie case. *See Mahaffey,* 162 F.3d at 485-86. "[T]he trial judge should have been comparing the excused African-Americans to the jurors who remained, for only through such a comparison could the judge assess whether race played any role in the State's challenges." *Id.* at 485. "If an excused African-American juror had characteristics and opinions that were similar to those of a juror who sat, for example, then an obvious inference, at least prior to the articulation of a race-neutral explanation for the strike, would be that the strike was racially motivated." *Id.* at 485-86. The *Mahaffey* court specifically noted that the state trial judge acknowledged similarities between blacks who were excluded and whites who were permitted to serve. *Id.* at 486. "[T]he crucial and determinative inquiry in a *Batson* claim is whether the state has treated similarly situated venirepersons differently based on race." *Coulter,* 155 F.3d at 921.

Unfortunately, for purposes of our analysis, the *Mahaffey* court applied the pre-AEDPA standard. Under AEDPA, that a state court decision conflicts with a federal circuit court pronouncement interpreting a Supreme Court case may not necessarily be sufficient to warrant overturning it as contrary to/an unreasonable application of the Supreme Court case. What we must now decide is whether the *Mahaffey* rule flows so clearly from the Supreme Court's *Batson* formulation that the Illinois Supreme Court's conclusion was contrary to *Batson* or, at minimum, an unreasonable application of the *Batson* standard. A careful review of *Batson* indicates the answer is yes.

The Supreme Court gave two examples (not all inclusive) of matters a court should consider as among "all the relevant circumstances" in determining whether a defendant has established a prima facie case: the pattern of strikes and the questions asked by the prosecutor during voir dire. It is the latter that suggests our answer. If a prosecutor questions blacks significantly differently than whites (*e.g.*, only blacks get questioned or only blacks get questions tailored to exclude), a potential inference of discrimination, at least for purposes of a prima facie case, arises. Similarly, and this appears to be the principle of *Mahaffey,* if a prosecutor reacts differently to the same answers to the same questions (either during voir dire or on the juror information cards[5]) by blacks and whites, there arises, at least for purposes of establishing a prima facie case, an inference of possible discrimination. Significantly, the state court's test – whether the excluded blacks

[5] In this case, it appears the prosecutor asked few questions.

share characteristics with each other other than race – lacks a certain degree of logic. That the excluded blacks share characteristics other than race gives one no comfort that discrimination has not taken place if white jurors with those same characteristics are permitted to serve as jurors.

In sum, *Batson* compels the conclusion that similarities between excluded minority jurors and accepted white jurors is a relevant circumstance to be considered in determining whether a defendant has established a prima facie case. As such, the Illinois Supreme Court's decision to specifically disregard such information was contrary to, or an objectively unreasonable application of, the *Batson* standard. While some blacks did serve on Petitioner's jury, the exclusion of even one juror of Petitioner's race for a discriminatory reason violates *Batson*. Moreover, a *Batson* violation is a "structural" flaw in the trial that is not subject to a harmless error analysis. *See Ashford v. Gilmore,* 167 F.3d 1130, 1136 (7th Cir. 1999), *cert. denied,* 529 U.S. 1086, 146 L. Ed. 2d 640, 120 S. Ct. 1717 (2000) (citing *Vasquez v. Hillery,* 474 U.S. 254, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986); *Rosa v. Peters,* 36 F.3d 625, 634 n.17 (7th Cir. 1993). "[W]hen a petit jury has been selected upon improper criteria or has been exposed to prejudicial pretrial publicity, we have required reversal of the conviction because the effect of the violation cannot be ascertained." *Vasquez,* 474 U.S. at 263.

This court must hold that the Petitioner is entitled to a new hearing in the Illinois courts on his *Batson* claim. That such a hearing may be rendered difficult by the passage of time does not alter this calculus, *see Vasquez,* 474 U.S. at 264-265, nor does the possibility that a retrial

may prove necessary if holding a belated *Batson* hearing is impracticable. *See Rosa,* 36 F.3d at 634-35.

B. Waiver of Sentencing Jury

Petitioner maintains that the State violated his 6th, 8th, and 14th Amendment rights because his waiver of a sentencing jury was invalid. Petitioner maintains that his waiver was not "knowing" because the state judge misinformed him regarding the jury's role in the eligibility phase of his death penalty hearing and that no one informed him about Illinois' "one-juror" rule (no death penalty imposed if one juror votes against it). The Respondent maintains the waiver was valid because Petitioner consulted with his counsel, was fairly informed of his options, and executed a written waiver. In addition, the Respondent argues that no established "constitutional rule" is implicated by Petitioner's claim.

1. Legal Standard

"Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States,* 397 U.S. 742, 748, 25 L. Ed. 2d 747, 90 S. Ct. 1463 (1970). A waiver will not necessarily be invalid because a defendant "lacked 'a full and complete appreciation of all of the consequences flowing' from his waiver;" the waiver will stand if the information provided "to him satisfied the constitutional minimum." *Patterson v. Illinois,* 487 U.S. 285, 294, 101 L. Ed. 2d 261, 108 S. Ct. 2389 (1988) (internal cite omitted).

2. State Court Decision

The Illinois Supreme Court rejected this claim on direct appeal.

Defendant's first challenge to the conduct of the death penalty sentencing hearing is that because the trial judge incorrectly explained the procedure used when a jury decides whether a death sentence should be imposed, he did not knowingly and intelligently waive his right to have a jury at the sentencing hearing. Although "[t]he right to a sentencing jury in a capital case is a statutory, not a constitutional, right" . . . , a defendants' waiver of this right has to be knowing and intelligent . . . The error the trial judge made was to tell defendant that, regardless of whether he (the judge) or a jury sentenced defendant, he would make the initial decision on defendant's eligibility for the death penalty, instead of correctly telling defendant that, if defendant elected to have a jury sentence him, it would be the jury that would have to find, unanimously, that defendant was eligible for the death penalty (Ill.Rev.Stat.1985, ch. 38, par. 9-1(g)).

Defendant is correct that the trial judge misstated the law when he told defendant, before trial, that, if defendant chose to be sentenced by a jury, the following would occur:

> "If you are found guilty there first has to be a hearing to determine whether or not you are eligible for the Death Penalty. There is [sic] a number of factors that enter into that and it is a decision I make as the Judge. Assuming that you were eligible for the Death Penalty then there has to be a hearing by the same Jury who decided guilt or innocence as to whether or not that penalty is appropriate for you as an individual pertaining to this crime and the other factors

that I'm sure you have gone over with your lawyer."

The trial judge further informed defendant he had a right to be sentenced by a jury; if he waived this right the jury would decide only his guilt or innocence and the judge would decide whether he should be sentenced to death. In response to the judge's questions, defendant confirmed a number of times that, after talking with his attorney, he wished to waive his right to be sentenced by a jury; he also signed a written waiver.

Despite the trial judge's misstatement, we find defendant's waiver to have been knowing and intelligent. Defendant's attorney told the judge that he had previously discussed the issue of a sentencing jury with his client (and, just minutes before defendant voiced the waiver, he and his attorney again discussed it); he also told the judge that defendant had decided to waive a sentencing jury, and he affirmatively answered the judge's question, "[D]o you feel that your client understands sufficiently to make this decision with you?" We have previously held that a waiver of a sentencing jury is knowing and intelligent, even when a trial judge does not inform a defendant of all aspects of having a jury decide the sentence and is alleged to have misstated the law, if the record shows the defendant consulted with his attorney, the defendant said he understood the consequences of waiver, and the defendant's attorney said he thought the defendant's decision was made knowingly and intelligently . . . Defendant argues that those cases are inapposite because they involved the effect of a judge's failure to inform a defendant that a jury's sentencing decision would have to be unanimous, not an affirmative misstatement of the law, as is involved here. In our opinion this distinction is irrelevant. The

record shows that defendant made the waiver decision after talking with his attorney there is no doubt in our minds that defendant's attorney was at least competent, and defendant does not claim his attorney misinformed him of the effect of a waiver and before talking to the judge; so defendant's waiver decision was not based, even in part, on the judge's misstatement of law.

Additionally, defendant argues that his waiver was not knowing and intelligent because the trial judge did not tell him that a jury's decision to sentence him to death would have to be unanimous, but defendant has not presented any reasons warranting a reconsideration of our prior holdings that it is not error to fail to so inform a defendant . . .

See 142 Ill. 2d at 333-5, 568 N.E.2d at 1270-1, 154 Ill. Dec. at 821-2.

3. Analysis

As an initial matter, we note that the Illinois Supreme Court applied the correct legal standard – whether the waiver was knowing and voluntary. However, their conclusion, and the Respondent's current argument, that only state law is implicated by this waiver appears to be incorrect.

Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant's interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the

jury in the exercise of its statutory discretion, . . . , and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State.

Hicks v. Oklahoma, 447 U.S. 343, 346, 65 L. Ed. 2d 175, 100 S. Ct. 2227 (1980). An invalid waiver of a sentencing jury would constitute a constitutional claim.

As to the merits, the first portion of Petitioner's argument is ultimately unpersuasive. Misinformation about the role of the sentencing jury can undoubtedly invalidate a waiver. *St. Pierre v. Cowan,* 217 F.3d 939 slip op. at 21-23, (7th Cir. 2000) (applying pre-AEDPA standard). In *St. Pierre,* the trial judge's statements may have erroneously conveyed the message that the sentencing jury would have to be unanimous to impose *or elect not to impose* the death penalty. *Id.* This affirmative misstatement would serve to completely mislead a defendant about Illinois' one-juror rule. *Id.* at 22. The state judge in this case undoubtedly misinformed the Petitioner that he, rather than a sentencing jury, would decide if Petitioner were eligible for the death penalty. However, this misrepresentation appears far less significant than the one in *St. Pierre.*

There is differing constitutional treatment accorded to the two phases of a capital sentencing hearing. *See Buchanan v. Angelone,* 522 U.S. 269, 275, 139 L. Ed. 2d 702, 118 S. Ct. 757 (1998). In the eligibility phase, the class of defendants eligible for the death penalty is narrowed, generally through the consideration of aggravating circumstances. *Id.* In this phase, it is critical to limit discretion to ensure that "the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition." *Id.* at 275-76. In the selection phase, however,

the decision is whether to impose a death sentence on a particular eligible defendant. *Id.* at 275. This phase requires "a broad inquiry into all relevant mitigating evidence to allow an individualized determination." *Id.* at 276. In this case, the trial judge's comment only misstated the mechanics of the eligibility phase.

In Illinois, in determining eligibility for a death sentence, the judge or jury must consider the statutory aggravating factors. *See* 720 ILCS 5/9-1(b). As such, the eligibility phase is fairly mechanical – assessing whether a defendant meets the listed standard. *See generally Sanchez,* 189 F.3d at 624 ("[D]efendants often concede eligibility and move directly to the aggravation-mitigation phase of the sentencing hearing"). The trial judge engaged in just such a mechanical assessment. (*See* State Criminal Trial Record at pp. [sic] 2139.) Petitioner's eligibility was readily established by two undisputed facts-he was 18 years old or older at the time of the offense and he committed the murder during the course of another felony (aggravated kidnaping). *See* 720 ILCS 5/9-1(b) and (b)(6)(c). The only way the result regarding eligibility would have changed is if the jury utterly disregarded the legal standard. However, "[j]ury nullification is a fact, because the government cannot appeal an acquittal, it is not a right, either of the jury or of the defendant." *United States v. Perez,* 86 F.3d 735, 736 (7th Cir. 1996) (a "defendant has no right to invite the jury to act lawlessly"). Unlike *St. Pierre,* who was misinformed about, arguably, the most significant aspect of the Illinois sentencing scheme, Petitioner was misinformed about an aspect of the Illinois sentencing scheme that could only have yielded a different result if the jury disregarded the law.

Petitioner's second contention, that he was not informed of the "one-juror" rule, is a bit more troublesome, as it appears to be a significant fact that a defendant should consider in evaluating the advisability of waiving a sentencing jury. However, one of our colleagues in the district court recently rejected this identical challenge. *See U.S. ex rel. Whitehead v. Page,* 2000 U.S. Dist. LEXIS 5522, No. 96 C5013, 2000 WL 343209 at * 17-18 (N.D. Ill. Mar. 30, 2000) (J. Williams).[6] *See also Enoch v. Gramley,* 70 F.3d 1490, 1506 (7th Cir. 1995), *cert. denied,* 519 U.S. 829, 136 L. Ed. 2d 50, 117 S. Ct. 95 (1996). This case relied upon *DeRoberts* and *Wandick,* in which the Seventh Circuit held that a state defendant's personal knowledge of his right to participate in the selection of jurors and to only be convicted upon a substantial majority vote is not required under the constitution for a knowing and intelligent jury waiver. *See U.S. ex rel. Wandick v. Chrans,* 869 F.2d 1084, 1088 (7th Cir. 1989); *U.S. ex rel. Williams v. DeRobertis* [sic], 715 F.2d 1174 (7th Cir. 1983), *cert. denied,* 464 U.S. 1072 (1984). While neither *Wandick* or *DeRoberts* deal with sentencing juries, there appears to be no reason to conclude that the standard is higher for the jury that sets the penalty than the jury that determines guilt or innocence.

The matter is not clear, however. The Seventh Circuit has opined that an attorney's failure to inform his client about Illinois' "one-juror" role was ineffective assistance of counsel (prejudice results because the defendant would have had a different decision maker). *See Hall,* 106 F.3d at

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[6] Judge Williams was recently elevated to the Seventh Circuit.

752-53 (AEDPA case). *Hall* does not discuss *Wandick* and *DeRoberts* nor directly cites any Supreme Court cases precisely on point. Does this holding imply that failing to notify a defendant about the "one-juror" rule invalidates a waiver? As previously discussed, the Seventh Circuit recently held that *affirmatively misinforming* a defendant about the Illinois one-juror rule can invalidate a waiver, citing *Hall. See St. Pierre,* slip op at 21-3. However, *St. Pierre* does not cite any Supreme Court authority and applies the pre-AEDPA standard. Moreover, *St. Pierre* appears to concede that the issue of whether the Constitution requires a capital defendant to be informed of the unanimity requirement is an open one. *Id.* at 22. At bottom, while the call is a close one, given that *Hall* and *St. Pierre* were decided long after the Illinois Supreme Court decision here, that neither case cites directly controlling Supreme Court authority, and that both cases are factually distinguishable from the case at bar, we must conclude that the Illinois Supreme Court's decision runs afoul of no controlling Supreme Court authority. Petitioner's second claim must fail.

C. Denial of Fair Trial – Cumulative Errors

Petitioner next claims that he was denied a fair trial due to the cumulative effect of several errors: (1) the prosecutor submitting the petitioner's entire confession to the jury, even though it contained prejudicial references to another planned crime; (2) the prosecutor eliciting testimony about prior consistent statements from a key prosecution witness; (3) the prosecutor making an improper

closing argument designed to inflame the jury's emotions; and (4) the prosecutor making improper statements about the lack of fingerprint evidence.[7] The Respondent maintains this claim is waived because it was not presented as a cumulative error claim (or a prosecutorial misconduct claim regarding issues # 1 and # 2) to the state court, and, alternatively, that the state court correctly ruled on the individual issues.[8] Petitioner replies that the claim was not waived because the dissent addressed the cumulative error issue.

1. Legal Standard

Trial errors which appear harmless in isolation can, when their cumulative effect is considered, alter the course of a trial so significantly as to violate a defendant's right to due process of law. *See Taylor v. Kentucky,* 436 U.S. 478, 487 n.15, 56 L. Ed. 2d 468, 98 S. Ct. 1930 (1978); *Alvarez v. Boyd,* 225 F.3d 820, 2000 U.S. App. LEXIS 22172, 2000 WL 1222097, at *4 (7th Cir. 2000).

"Rules of evidence are designed in the interest of fair trials." *United States v. Augenblick,* 393 U.S. 348, 352, 21 L. Ed. 2d 537, 89 S. Ct. 528 (1969). "But unfairness in

[7] The Petitioner's claim is confusingly presented and appeared to be stated in terms of prosecutorial misconduct, even though issues (1) and (2) are claims about the improper admission of evidence. Petitioner made it clear that he intended the claim to be a challenge to cumulative trial errors in his Memorandum in Support of his Petition.

[8] Respondent noted the state court believed certain claims were waived for failure to raise them in a post-conviction motion. However, the Illinois Supreme Court, at minimum, reviewed the merits of each claim under the plain error standard. As such, the claims appear, at least individually, to be preserved for habeas review.

result is no measure of unconstitutionality." *Id.* "But apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten . . . that the proceeding is more a spectacle . . . or trial by ordeal . . . than a disciplined contest." *Id.* at 356. To be of constitutional significance for purposes of habeas relief, "an erroneous evidentiary ruling must be so prejudicial that it compromises the petitioner's due process right to a fundamentally fair trial." *Howard v. O'Sullivan,* 185 F.3d 721, 723-24 (7th Cir. 1999). "This means the error must have produced a significant likelihood that an innocent person has been convicted." *Id.* at 724. As such, "evidentiary questions are generally not subject to review in habeas corpus proceedings." *Id.*

As to prosecutorial misconduct, to warrant habeas relief, a prosecutor's actions must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainright,* 477 U.S. 168, 181, 91 L. Ed. 2d 144, 106 S. Ct. 2464 (1986). *See also Donnelly v. DeChristoforo,* 416 U.S. 637, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974). Factors considered include: (1) whether the prosecutor manipulated or misstated the evidence; (2) whether the prosecutor's comments implicated specific rights of the accused (e.g., right to remain silent, right to counsel); (3) whether prosecutor's remarks were invited by defense; (4) the weight of evidence against the accused; and (5) any corrective instructions by trial court. *Darden,* 477 U.S. at 181-83.

2. State Court Decision

The Illinois Supreme [sic] agreed that the disputed evidence was improperly admitted, but nonetheless rejected the Petitioner's claims.

Yet another error was made warranting reversal of his conviction, claims defendant, when his entire confession was admitted into evidence and read to the jury. After describing the sexual assault and murder in detail, defendant stated in his confession that he decided to murder another person, his mother's boyfriend:

"A. I was going to take care of some more busines[s]. I was going to kill somebody else who did something wrong to my mother.

* * * *

Q. Why did you go to 71st and Paulina?

A. Because I wanted some revenge to this person named Tracy Smith, who accidentally punched my mother in the mouth.

Q. Why did you go to do this at this time in the morning?

A. Because I felt bad about it, I had already done something dirty and said fuck it, I might as well finish it off."

But Smith had not been home. Defendant then told Croft to ditch the knife; Croft threw the knife into a garbage can. Afterwards, they drove to Croft's house and changed their clothes.

Before the confession was read, defense counsel moved for redaction of all statements regarding defendant's

intention to kill Smith. The trial judge denied the motion, reasoning that it appeared that one defense theory would be that the confession was involuntary, the product of a police beating; this theory would be disproved by defendant's statement that he had intended to murder someone for reasons unrelated to Boyd's murder. When asked by the judge to reveal whether this theory would be raised, defense counsel refused to do so, arguing that the proper method would be to introduce the redacted confession during the prosecution's case; if the defense later raised this theory, the entire confession could then be introduced. The trial judge decided against using this procedure, admitting the entire confession into evidence during the prosecution's case. Later, after the defense had rested, the judge acknowledged that no evidence of the confession's involuntariness had been produced; still, the judge believed the portion of the confession quoted above was admissible "because it has to do with the defense theory that Mr. Henderson didn't commit the crime at all and it's probative of the issue as to how that would have arisen in the course of the statement being given if Mr. Henderson was not responsible for the crime and was indicating things that related to this crime. Why would there be other things in there?"

Defendant cites decisions of this court holding that evidence that a defendant has committed crimes other than the crime for which he is being tried is inadmissible if irrelevant to any material issue, such as criminal intent or identification, for such evidence serves only to persuade a jury that the defendant has a propensity to commit crimes. . . . If a competent confession contains references to other crimes defendant has committed, those references have to be deleted before the confession is admitted into

evidence unless the confession's evidentiary value would be seriously impaired . . . Defendant argues that this portion of his confession lacked any probative value but was highly prejudicial, for after the jury learned that he was willing to kill a man who had accidentally punched his mother, it would have concluded he had a propensity to murder, and so been overpersuaded that he had killed Boyd.

We agree with defendant; these statements were irrelevant and should have been redacted from his confession. We reject the State's arguments that these statements were relevant because they showed how and where defendant disposed of the murder weapon (the murder weapon was never found and the defense suggested throughout trial that the police investigation was sloppy and hurried) and because in saying he "had already done something dirty" and he "might as well finish it off" defendant revealed a consciousness that he was guilty of Boyd's murder . . . The State's first relevancy argument is refuted by the fact that we were able to quote all of defendant's statements of intent to kill Smith without including his description of how the murder weapon was thrown away. As to the statements' relevancy to show consciousness of guilt, we first note the low probative value of defendant's statement that he "had already done something dirty," for, immediately before saying this, he had described in detail how he had sexually assaulted and murdered Boyd; we doubt the jury was any more convinced of defendant's guilt by hearing that, after murdering Boyd, he realized that what he had done was wrong. Furthermore, we have discovered that the confession could have been redacted in such a way as not only to include the statements showing consciousness of guilt while

omitting the statements of defendant's intent to kill Smith, but also to avoid any awkwardness that would have indicated to the jury that the confession had been redacted (and thus possibly have caused the jury to doubt the confession's voluntariness).

Yet the trial court's error in admitting defendant's entire confession into evidence was not reversible error. At no other time during trial did the prosecutor again refer to defendant's intention to kill Smith or try to persuade the jury that defendant's desire to kill Smith increased the likelihood that he had murdered Boyd. These once-mentioned statements were also not significantly prejudicial in nature because defendant merely expressed an intent, never realized, to kill Smith, which is far less prejudicial than is an actual admission to another crime . . . And these statements, viewed within the context of defendant's entire confession, do not manifest his possession of a propensity to murder before he murdered Boyd; rather, it appears he formed an intent to kill Smith only after, and in part because, he had murdered Boyd; thus, any propensity to murder was evidently created by his act of murdering Boyd. Finally, any prejudicial effect produced by these statements was overshadowed by the substantial evidence of defendant's guilt: his confession, corroborated by a police officer and assistant State's Attorney; Anthony Woodard's testimony describing the sexual assault and defendant's driving off with Boyd in the trunk of his car; and testimony by two others placing him and Boyd at the party on July 12-13. For these reasons, we conclude that the jury's verdict of guilty did not result from the error of admitting the confession unredacted . . .

Defendant also believes he was deprived of a fair trial by the prosecutor's evocation of inadmissible testimony

indirectly disclosing that Anthony had made prior statements to the police consistent with his trial testimony. On direct examination, Anthony testified that the only reason his brother Alonzo and Campbell had sexually assaulted Boyd, and the only reason Anthony did not try to physically stop the assault or flee and get help, was that defendant and Croft had held knives on them. Defense counsel's cross-examination impeached Anthony's credibility by establishing that he wanted to help his brother, whom he loved, and Campbell, who was like a cousin to him (Alonzo and Campbell were also on trial for the sexual assault, kidnaping, and murder of Boyd). Then, on redirect, the prosecutor asked, "Anthony, did you tell the police officers that night essentially the same thing that [you're] telling the ladies and gentlemen of the jury?" to which Anthony answered, after defense counsel's objection was overruled, "Yes, something like that."

Evidence of a prior consistent statement is inadmissible hearsay unless it has been suggested that a witness recently fabricated testimony or has a motive to testify falsely and the prior statement was made before the motive arose . . . Defendant argues that in this case the exception to the rule that prior consistent statements are inadmissible does not apply, for while defense counsel's cross-examination suggested Anthony had a motive to lie – in order to exonerate his brother and Campbell by putting all the blame on defendant and Croft – at the time Anthony talked to the police on July 17 he would have had the same motive – he would have wanted to protect his brother and Campbell then, too.

Defendant is correct; there is no doubt that the prosecutor erred in asking a question formulated to elicit

testimony from Anthony that he had made a prior consistent statement, and there is no doubt that the trial court erred in admitting this testimony. Anthony's motive to lie to protect his brother and Campbell would have existed when he talked to the police as well as when he testified – at neither time would he have wanted to implicate them. We note also that defense counsel suggested Anthony might have lied in order to protect himself from criminal prosecution; but this motive to lie would also have existed both on July 17 and at the time of trial.

As defendant recognizes, however, the fact that this was error is not enough because the error was waived when defendant failed to include it in his post-trial motion . . . Defendant therefore urges us either to recognize it as plain error (107 Ill.2d R. 615(a)) or to find that defense counsel's failure to include this issue in the post-trial motion constituted ineffective assistance of counsel, denying defendant his sixth amendment right to counsel (*Strickland v. Washington* (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674; . . . U.S. Const., amend. VI). We decline to do so.

The plain error doctrine provides that a court of review may notice waived errors if either the evidence is closely balanced or "the error is so fundamental and of such magnitude that the accused was denied a fair trial" and remedying the error is "necessary to preserve the integrity of the judicial process." . . . As we have already stated, the evidence in this case was not closely balanced. Nor do we find that defendant was denied a fair trial as a result of this portion of Anthony's testimony. The prejudicial nature of evidence of prior consistent statements is judged on a case-by-case basis. Admittedly, it is possible the jury saw Anthony as more credible because he said he

had given the police the same account four days after the murder, and people are more apt to believe what is repeated . . . But the prejudicial effect of this testimony was minimized by the fact that, unlike some cases relied upon by defendant where one witness corroborated another's testimony by testifying that the other made a prior consistent statement, here Anthony himself provided the evidence of his own prior consistent statement, and so his credibility was not truly enhanced; in other words, the jury would not have been inclined to attribute a great deal more credibility to Anthony's testimony because he had corroborated himself . . . Other circumstances also minimize the prejudiciality of this testimony: The testimony was general, not specific, in that Anthony said he told the police "something like" what he had testified to; no portion of Anthony's statement to the police was admitted into evidence . . . ; and at no other time during the trial was there a reference, general or specific, to what Anthony told the police.

See 142 Ill. 2d at 305-12, 568 N.E.2d at 1257-60, 154 Ill. Dec. at 805-11.

The Illinois Supreme Court also concluded that the prosecutor's comments were improper, but did not deprive Petitioner of a fair trial.

Defendant also contends that comments the prosecutor made during his closing and rebuttal arguments were so improper as to have denied him a fair trial. Defendant categorizes these comments as appeals for sympathy for Boyd and references to her family, and comments explaining why the prosecution had not presented certain scientific evidence.

Among the comments defendant criticizes are the following:

> "There is something about this that rips at my gut. [Objection sustained.]
>
> * * * *
>
> * * * [H]ave you ever had the opportunity to sit with a loved one as they are laying in a hospital bed gasping for their last breath * * * ?
>
> * * * *
>
> Imagine what was going through that young girl's mind when she had to sit laying in that alley looking at the front of that car beating down on her at 35 miles an hour, being struck by the bumper, dragged on the pavement. She was still alive.
>
> * * * *
>
> He talks about his rights. What about her rights? Did he ask Kim Boyd prior to taking a knife and plunging it in her head and in her neck, in her butt, in her legs, 'Do you want to talk to your mom before I kill you?' * * * Did he have the compassion to say, 'Do you want to complete high school * * * do you want to get married and have children and have a life with a family * * * ?'"

Clearly these comments were improper and were attempts to inflame the jurors' emotions and engender feelings of sympathy for Boyd and her family, causing some prejudice to defendant . . . Some also improperly expressed the prosecutor's feelings and invited the jurors to put themselves in Boyd's place. Yet these comments

were not so improper as to warrant reversal of the convictions. The first comment quoted was properly dealt with when the trial court sustained a defense objection. As to the other comments, defendant failed to object to them at trial, and his post-trial motion refers to them in only general terms as remarks made by the prosecutor that cumulatively denied him a fair trial. Thus, defendant has waived any error in relation to them . . . Owing to this waiver, we will only notice the prosecutor's comments if they were so improper that their toleration constituted plain error (107 Ill.2d R. 615(a)). This is not the case, for they did not cause substantial injustice to defendant . . . ; these comments did not effectively deprive defendant of a fair trial because the evidence of his guilt was substantial and was not closely balanced . . .

Moreover, even if defendant had not waived these errors we would find reversal to be unwarranted, for the standard of review applied to arguments by counsel is similar to the standard used in deciding if a plain error was made; attorneys are allowed some latitude in closing arguments, and comments constitute reversible error only when they engender substantial prejudice against a defendant . . . , such that it is impossible to say whether or not a verdict of guilt resulted from those comments. Here, the evidence of defendant's guilt was substantial enough that we conclude the jury would have returned a verdict of guilty even if the prosecutor had not made these comments . . .

The other allegedly improper comments by the prosecutor dealt with the fact, noted by defense counsel in his closing argument, that the prosecution had not presented any evidence that the police had found fingerprints linking

defendant to the murder. In rebuttal closing argument, this exchange occurred:

> "[ASSISTANT STATE'S ATTORNEY]: Prints. Did he [Mr. Linn, defense attorney] bring anybody in here? Did you hear any evidence at all about how difficult it is to raise a print?
>
> MR. LINN: Objection.
>
> THE COURT: Overruled.
>
> [ASSISTANT STATE'S ATTORNEY]: Did you hear any evidence, anybody get up on the stand and say, 'Hey, different surfaces leave different prints'? People don't usually leave prints. People who are sweating make certain or aren't able to leave prints.
>
> Anything like that? Call somebody in like an expert?"

A defense objection to the last comments was sustained, but the jury was not instructed to disregard them. (Defendant also complains of the prosecutor's comments suggesting that the reason the prosecution did not introduce results of analyses of swabs taken from Boyd's body was that such analyses would have been useless because the body was not examined for more than a day after it was found; defendant waived this alleged error by not objecting to it at trial, and we find that these comments did not constitute plain error because this suggestion was vague, there was substantial evidence of defendant's guilt, and the trial court told the jury that closing arguments are not evidence.)

According to defendant, because no evidence at trial supported the prosecutor's proposed reasons for the

prosecution's failure to introduce fingerprint evidence (it can be difficult to raise a fingerprint, and sometimes a person does not leave fingerprints), these comments were improper. In opposition, the State says these comments were fair response to two of the defense's arguments in closing: that the police should have looked for fingerprints at Croft's house and their failure to do so showed how they rushed to close this case of black boys killing a black girl as soon as defendant confessed; and that the jury should not convict defendant in the absence of physical evidence linking him to the murder.

Defendant is correct; the comments regarding reasons for the absence of fingerprint evidence were blatantly improper. However, the statement regarding defendant's failure to present a witness to testify to the process of raising a fingerprint was not error . . . It is a fundamental principle of trial practice that an attorney's argument is to be based on the evidence and reasonable inferences drawn from the evidence. . . . ; *United States ex rel. Shaw v. De Robertis* (7th Cir. 1985), 755 F.2d 1279 (defendant was denied fair trial by prosecutor's telling jurors they could not see police report because it was hearsay evidence, but if they could they would see truth, for comment insinuated that police report contained facts implicating defendant).) By the time an assistant State's Attorney, sworn to uphold justice for all of society, including a defendant, has reached the stage in his career when he is prosecuting a capital murder case this principle should have become deeply ingrained in his code of trial conduct. Indeed, we expect jurors to follow a judge's instruction, possibly given only once during trial, that what attorneys say during argument is not evidence and that their verdict should rest on their own understanding of the evidence. We cannot expect

less of prosecutors than that they abide by such a fundamental principle. Here the assistant State's Attorney, by ignoring this principle, created a risk that the jurors would be misled and confused and, because he appeared to have knowledge of fingerprint evidence superior to their own, would consider as evidence the reasons he proposed to explain the lack of fingerprint evidence. Another effect of these comments, as damaging as suggesting reasons fingerprints may not have been found without presenting any evidence of the scientific soundness of these reasons or their application to this case, was their inherent implication that the police in fact looked for fingerprints but did not find any, conduct which was not proved.

Despite the prosecutor's misconduct in making these comments, we do not think they served to deny defendant a fair trial, either alone or in combination with the comments referring to Boyd's thoughts, rights, and family. The trial court sustained defense objections to comments that were improper. Also, the trial court instructed the jurors, prior to closing arguments and at the end of trial, that closing arguments are supposed to be confined to the evidence and the inferences that can reasonably be drawn from the evidence, and they should disregard statements not so based. These circumstances, along with the substantial evidence of defendant's guilt, lead us to conclude that these improper comments do not warrant reversal of defendant's convictions.

See 142 Ill. 2d at 321-26, 568 N.E.2d at 1264-66, 154 Ill. Dec. at 815-18.

Justice Clark vigorously dissented, maintaining that the cumulative effect of these errors was to deprive the Petitioner of a fair trial.[9]

3. Analysis

The Petitioner emphasizes the state court dissent; however, whether the dissent had the better view is not really the issue under the new standard. *See Sanchez,* 189 F.3d at 624-25. That the trial was somewhat sloppy is also evident, but that does not necessarily yield much for the Petitioner. "[T]hat we may think certain things could have been handled better by the state trial judge or by the

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[9] "As the majority recognizes, numerous evidentiary errors were made at defendant's trial. For example, the majority finds that certain statements relating to defendant's intent to commit an unrelated crime should have been redacted from defendant's confession before it was read to the jury . . . ; that the State improperly asked questions formulated to elicit testimony of a prior consistent statement from one of the State's key witnesses . . . ; that the prosecutor made numerous improper statements in his closing argument intended to "inflame the jurors' emotions and engender feelings of sympathy for [the victim] and her family, causing some prejudice to defendant" . . . ; and that the prosecutor made improper statements regarding the absence of fingerprint evidence which would tie defendant to the crime. . . . In considering each of these errors individually, the majority concludes that none of them warrant reversal. The majority's basis for this conclusion is that some of the errors made at trial were waived by defendant's failure to raise them in his post-trial motion, and others were harmless due to the overwhelming evidence of defendant's guilt. I agree that when considered individually, none of the errors warrant reversal. However, I believe that the cumulative effect of these errors has deprived defendant of his constitutional right to a fair trial. This court has frequently reversed convictions and sentences where there were errors which cumulatively served to deprive the defendant of due process. . . . " *See* 142 Ill. 2d at 348-9, 568 NE.2d at 1277, 154 Ill. Dec. at 828.

prosecuting attorney or by the state reviewing court means very little." *Id.* at 623.

This court concludes that Petitioner's cumulative trial error claim was procedurally defaulted by his failure to raise it before the Illinois Supreme Court. A review of Petitioner's brief on direct appeal shows that the two evidentiary issues (the unredacted confession and testimony about prior consistent statements) were raised as individual challenges, separate from each other and the prosecutorial misconduct claims. Further, Petitioner's reliance on *County Court of Ulster v. Allen,* 442 U.S. 140, 60 L. Ed. 2d 777, 99 S. Ct. 2213 (1979), appears misplaced, as the Court looked to the dissent as *one* factor in determining whether an issue was ruled upon on the merits. In this case, it is all the Petitioner has, as the majority opinion plainly did not consider a cumulative error claim. Obviously, given the number of claimed errors, the Petitioner was free to raise the issue or the state court to consider it *sua sponte,* but neither chose to do so. In addition, Petitioner cannot establish cause and prejudice or actual innocence to excuse this default. Moreover, we note that even if the claim had not been defaulted it would fail on the merits.

The Illinois Supreme Court did not cite *Augenblick* nor *Darden* or *DeChristoforo* in its opinion. Nonetheless, in evaluating most of the claims under a plain error standard, which focused upon whether the Petitioner was deprived of a fair trial, its analysis was not significantly at odds with the Supreme Court's formulations.

As to the evidentiary challenges themselves, while neither would have occurred in a "perfect trial," they neither singly or together amount to a cognizable claim.

These rulings did not render the trial fundamentally unfair nor did they result in the conviction of an individual who was likely innocent. The isolated reference to another crime and the state's witness' "self-vouching" were inconsequential in light of the weighty evidence of Petitioner's guilt. Further, the reference to the other crime was of a plan to commit another crime rather than another actual offense. This brief reference, coming after a lengthy confession of a brutal homicide, was unlikely to have a significant impact on the jury. *See generally Jones v. Page,* 76 F.3d 831, 855 (7th Cir.), *cert. denied,* 519 U.S. 951, 136 L. Ed. 2d 254, 117 S. Ct. 363 (1996).

As to the prosecutorial misconduct challenge, we, like the Illinois Supreme Court, were troubled by the prosecutor's comments. We must note, however, that the prosecutor's actions were not significantly worse than those of the prosecutors in *Darden* and *Hennon v. Cooper,* 109 F.3d 330 (7th Cir. 1997), *cert. denied,* 522 U.S. 819, 139 L. Ed. 2d 32, 118 S. Ct. 72 (1997) (AEDPA case). In *Darden,* the prosecutor's comments included: (1) that he was convinced of defendant's guilt; (2) that if he was the defendant facing the death penalty, he would lie to get out of it; (3) that the defendant was an animal; (4) that the victim should have blown the defendant's face off with a shotgun; (5) that the prosecutor would like to see the defendant with a blown off face; (6) that the defendant should kill himself; and (7) that it was unlucky for everyone that the defendant was not killed in his car accident. 477 U.S. at 180-1, 191. In *Hennon,* the prosecutor stated: (1) that passengers in drive-by murders "get convicted all the time"; (2) that accountability is like "a steel ball and anybody that helped the ball go down the ramp" should be guilty of murder; (3) that defense counsel wants to "put barriers in front of you

[the jury]"; (4) that "when you put a witness on the stand you're vouching for his credibility"; (5) that defendant had a right to waive a jury and have the judge decide the case; (6) that gangs operate like "wolf packs"; and (7) "your verdicts will decide the type of conduct that you're going to tolerate on the streets of our city." 109 F.3d at 332-3. Neither *Darden* nor *Hennon* resulted in the granting of habeas relief. Again, given the weight of evidence – which included the Petitioner's lengthy confession – the prosecutor's comments did not render the trial fundamentally unfair. In sum, while this court is given some pause by some of the sloppiness in the Petitioner's trial, we cannot conclude that there is anything objectively unreasonable about the state court's analysis of the relevant issues.

D. Trial Judge's Failure to Consider Mitigating Evidence

Petitioner maintains that the trial judge deprived him of a fair and reliable death penalty hearing by refusing to consider the mitigating evidence of Petitioner's traumatic childhood and turbulent family history. Petitioner emphasizes that the trial judge incorrectly concluded that such evidence was not mitigating as a matter of law. Respondent maintains that the issue was procedurally defaulted, or, alternatively, that the trial judge was free to construe the evidence as aggravating rather than mitigating.

1. Legal Standard

The Eighth Amendment requires an individualized sentencing determination in death penalty cases. *Stringer v. Black,* 503 U.S. 222, 230, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992). The sentencer in a capital case "may not be

precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. . . . " *Weeks,* 120 S. Ct. at 732. *See also Buchanan v. Angelone,* 522 U.S. 269, 276, 139 L. Ed. 2d 702, 118 S. Ct. 757 (1998). "If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.'" *Penry v. Lynaugh,* 492 U.S. 302, 319, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989) (quoting *California v. Brown,* 479 U.S. 538, 545, 93 L. Ed. 2d 934, 107 S. Ct. 837 (1987)). However, some mitigating factors, such a [sic] history of abuse by family members and mental conditions, can be two-edged swords – they may reduce the blameworthiness for the crime even as they indicate that the defendant may be dangerous in the future. *Id.* 492 U.S. at 324.

2. State Court Decision

The Illinois Supreme Court unequivocally rejected Petitioner's challenge on direct appeal.

Next, defendant earnestly argues that the trial judge wrongly judged the significance of evidence of defendant's "traumatic childhood and turbulent family history" and how "to a substantial extent, he is the involuntary product of an extremely violent and dysfunctional family environment," involuntary because he did not choose his relatives and his upbringing. At the sentencing hearing, defendant introduced the testimony of a social worker, Ms. Dinguss,

and a psychosocial evaluation of defendant she had prepared. In brief, this evidence revealed: Defendant, an only child, was raised by his mother, his father having been shot and killed by his mother's uncle before defendant reached his first birthday; this same uncle was shot and killed by his own wife; defendant's grandfather committed suicide; defendant's mother was sexually promiscuous throughout his childhood, a situation he resented, and defendant had been abused by men; his mother had also been molested to some degree by her father and uncle; defendant said his female cousins had molested him; as for defendant's past behavior, he had been involved in gangs, had hit women with his hands and hit the mother of one of his many children with a wrench, and had shot at a woman on a public street. Although defendant had never been physically abused, in Ms. Dinguss' opinion he had been emotionally abused by his mother's conduct and criticism of him, and had suffered some "psychological trauma" from his upbringing in a family situation that was, as a whole, "severely dysfunctional." Ms. Dinguss also stated that, owing to limited information, she was not able to determine the extent of this psychological trauma; yet she concluded that defendant's violent impulses would escalate unless he received "long-term intensive psychotherapeutic intervention."

Before sentencing defendant, the trial judge stated those facts he had considered and the conclusions he had made about defendant's character as a whole and about defendant's demeanor and motivations on the night of July 12-13, 1986. At this time, the trial judge commented on the evidence defendant submitted about his upbringing and its effect on the type of person he was:

> "There has been testimony from Miss Dinguss relative to the fact that she believes that it was inevitable in the Defendant's life that this act of outrageous violence would occur because of the Defendant's upbringing. A mitigating factor is not that it is inevitable that the Defendant act out his aggressions against people and society, the mitigating factor is that there is some way to rehabilitate and change that and make sure that it will never happen again.
>
> There has been no testimony to that, in fact to the contrary, the testimony has been that the Defendant acts out his violence towards women, the young, the unprotected, he acts out toward them because of the relationship with the family. Whether that is true or whether it is not true it is not a mitigating factor to be determined that the Defendant can be released into society to perform good works, rather it shows me that based on the acts in this case, that the Defendant will act out his aggression violently and outrageously just as was done here."

Defendant argues that these remarks show that the trial judge did not understand that mitigating evidence can include evidence that a defendant was not fully culpable and responsible for his acts owing to his upbringing and does not encompass only evidence showing a defendant to be a good person who will do good works in the future. Because the evidence of his upbringing lessened his culpability for the horrendous crimes he committed, defendant contends the judge deprived him of a fair and reliable capital sentencing hearing under the eighth amendment (U.S. Const., amend. VIII) when the judge refused to see that this evidence was mitigating in any way, and instead considered it as aggravating solely,

reasoning that it showed defendant had a violent nature and failed to show he could ever be rehabilitated so as not to pose a danger to society. As support, defendant contends that the Supreme Court has held that when a sentencer is deciding whether to sentence a defendant to death and is presented with evidence of the defendant's traumatic childhood, the sentencer has to consider it as mitigating. Defendant, not content merely to argue that this judge erred in finding evidence of his upbringing to be aggravating and not mitigating, further asserts that evidence of a defendant's traumatic childhood, during which he suffered emotional abuse, is comparable to evidence of mental illness and, thus, is inherently mitigating and can never be considered aggravating. Defendant believes "if these conditions also make it likely that the defendant may act violently, that is simply not his fault and can't be considered a reason to impose the death penalty upon him."

Despite defendant's attempts to find support for the rule he proposes, he fails to prove that the Court has ever held that a sentencer invariably has to give mitigating weight to evidence of a defendant's troubled childhood and can never assign it aggravating weight. It is true that, in general, "'punishment should be directly related to the personal culpability of the criminal defendant.'" (*Thompson v. Oklahoma* (1988), 487 U.S. 815, 834, 108 S. Ct. 2687, 2698, 101 L. Ed. 2d 702, 717, quoting *California v. Brown* (1987), 479 U.S. 538, 545, 107 S. Ct. 837, 841, 93 L. Ed. 2d 934, 942.) But the Court's pronouncements about the significance of mitigating evidence introduced by a defendant have declared merely that, when such evidence is relevant, a sentencer can neither refuse to consider it (*Eddings v. Oklahoma* (1982), 455 U.S. 104, 102 S. Ct. 869, 71 L. Ed. 2d 1) nor be precluded from considering it (as

occurs when a judge instructs a sentencing jury that it can consider only evidence satisfying a limited list of mitigating factors) (*Hitchcock v. Dugger* (1987), 481 U.S. 393, 107 S. Ct. 1821, 95 L. Ed. 2d 347). Defendant endeavors to persuade us that, because the Court has said a sentencer cannot refuse to consider relevant mitigating evidence presented by a defendant, it has held that a sentencer must give it some mitigating weight. We disagree with the conclusion. The Court has held only that when the sentencer is a judge, the sentencer cannot refuse to hear evidence introduced as mitigating, and cannot refuse to consider whether that evidence is in fact mitigating on the basis that the sentencing judge believes the evidence is barred by law from being considered as mitigating. This was the case in *Eddings*: The sentencing judge believed that he could not consider evidence of defendant's troubled youth, during which he had little parental supervision and was severely beaten by his father, causing defendant to become emotionally disturbed, slightly retarded, and sociopathic, because it did not fall under any of the mitigating factors listed in the statute. The Court elucidated the sentencing judge's error: "It is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of fact; rather he found that as a matter of law he was unable even to consider the evidence." (Emphasis in original.) *Eddings*, 455 U.S. at 113, 102 S. Ct. at 876, 71 L. Ed. 2d at 10.

Contrary to defendant's argument, the Court has indicated that evidence of an upbringing which has caused a defendant to become violent and aggressive can be considered in aggravation, for one duty a sentencer has is to predict a defendant's future behavior based on his past behavior. (*Skipper v. South Carolina* (1986), 476 U .S. 1, 5,

106 S. Ct. 1669, 1671, 90 L. Ed. 2d 1, 7.) In *Burger v. Kemp* (1987), 483 U.S. 776, 793-94, 107 S. Ct. 3114, 3125-26, 97 L. Ed. 2d 638, 656-57, the Court held that defense counsel had not acted ineffectively by failing to introduce evidence of the defendant's troubled background at the sentencing hearing; while the sentencing jury might have been sympathetic, it also might have thought the defendant was nonetheless responsible for the criminal conduct engendered by his violent nature and that his violent nature made him a danger to society – "'"mitigation, after all, [m]ay be in the eye of the beholder [citations]."'"

Defendant is also mistaken about the holding in *Penry v. Lynaugh* (1989), 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256. Penry did not hold that a sentencer has to consider evidence of a troubled childhood in mitigation because it always reduces a defendant's culpability, and that it is improper to consider such evidence's aggravating implication that a defendant may be dangerous in the future. In *Penry*, there was evidence that the defendant was moderately retarded and unable to learn from his mistakes, and, as a child, had been beaten about the head by his mother. Although the trial judge admitted this evidence, the judge did not instruct the sentencing jury that it might be considered as mitigating. Rather, the jury was instructed that, before deciding whether to sentence the defendant to death, it had to answer three questions affirmatively, as required by the Texas death penalty statute; while no question asked about mitigation, in arriving at an affirmative answer to one question, whether the defendant would be a continuing threat to society, the jury might have actually assigned a negative value to the evidence of defendant's retardation and upbringing. The Court held that the trial judge had erred by failing to

instruct the jury that, besides answering these three questions, it could give effect to any mitigating value possessed by the evidence of defendant's background. Even so, in characterizing this evidence the court recognized that "Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." (*Penry*, 492 U.S. at 307-311, 319-20, 324, 329, 109 S. Ct. at 2941-42, 2947, 2949, 2952, 106 L. Ed. 2d at 271-72, 279, 281-82, 284.) The Court did not state either that this evidence was inherently mitigating and the sentencer was required to consider it as such, or that it would be improper to consider this evidence in aggravation as it indicated the defendant had an unrehabilitable violent nature. Rather, the error was that the jury instructions allowed the jury to consider only one edge of this two-edged sword.

Analyzing the quoted comments of the trial judge in the present case, along with other comments he made before sentencing defendant, we conclude that the judge acted within his discretion in finding that the evidence of defendant's family history was not such that it mitigated his conduct in raping and murdering Boyd. (*See People v. Christiansen* (1987), 116 Ill. 2d 96, 122, 107 Ill. Dec. 198, 506 N.E.2d 1253 (supreme court will not lightly overturn trial court's findings made during aggravation and mitigation phase of death penalty hearing).) As a whole, the trial judge's comments reveal that he saw defendant as a young man who had coldly, and over the course of several hours, committed these horrendous acts, which were typical of his violent nature toward young women, and who could not be rehabilitated and so would remain a dangerous and

violent person. The trial judge believed defendant deserved to be sentenced to death. The quoted comments do not show that the trial judge believed he was somehow precluded from viewing the evidence of defendant's background as mitigating; rather, the trial judge admitted this evidence, considered what it revealed about defendant, and concluded that it simply had no mitigating value but was actually aggravating. As we explained, the Court has never held that a sentencer is required to give mitigating weight to such evidence, and we find that the trial judge did not err in his evaluation of this evidence.

See 142 Ill. 2d at 334-41, 568 N.E.2d at 1271-3, 154 Ill. Dec. at 822-24.

3. Analysis

We note at the outset that the Illinois Supreme Court cited the appropriate Supreme Court cases in its analysis. Moreover, a review of the state trial judge's decision persuades us that the Petitioner's claim is baseless. [10]

At the start, the trial judge stated that all circumstances were to be considered in sentencing the Petitioner. (State Criminal Trial Record at pp. 2377.) The trial judge then covered each of the statutory mitigating factors, including evidence of prior criminal activity (State Criminal Trial Record at pp. 2377), whether Petitioner was under some extreme mental or emotional disturbance (State Criminal Trial Record at 2379, 2382), whether the

[10] The claim was addressed on the merits by the Illinois Supreme Court, so it was not procedurally defaulted.

victim was a participant (State Criminal Trial Record at pp. 2380), whether Petitioner's actions were coerced (State Criminal Trial Record at pp. 2381), and whether Petitioner was present at the homicide (State Criminal Trial Record at pp. 2384). The trial judge also explicitly referred to Petitioner's family life and background as presented by Ms. Dinguss. (*See, e.g.,* State Criminal Trial Record at pp. 2380, 2383.)

As did the Illinois Supreme Court, we do not believe the trial judge's statements indicate that he believed that he was foreclosed from considering the Petitioner's evidence. There is no doubt the trial judge considered Petitioner's family life. Petitioner, at bottom, is complaining that the trial judge did not believe it was sufficiently mitigating to prevent the imposition of the death penalty.

Unfortunately for Petitioner, there's nothing legally improper or, for that matter, even surprising, about a judge or jury interpreting evidence offered in "mitigation" as evidence of future dangerousness (or inability to be rehabilitated), and therefore "aggravating." The sentencer "may not be impressed with the idea that to know the cause of viciousness is to excuse it; they may conclude instead that, when violent behavior appears to be outside the defendant's power of control, capital punishment is appropriate to incapacitate." *Burris v. Parke,* 130 F.3d 782, 784-85 (7th Cir. 1997). *See also Britz v. Cowan,* 192 F.3d 1101, 1104 (7th Cir. 1999), *cert. denied,* 529 U.S. 1006, 146 L. Ed. 2d 233, 120 S. Ct. 1274 (2000) ("People with his background of antisocial behavior are more likely to commit murders than other people, but this does not make them attractive candidates for lenity; rather, it underscores their dangerousness"). There is nothing

unreasonable about the Illinois Supreme Court's analysis of this issue.

E. Trial Judge's Use of Mitigation Standard in Sentencing

Petitioner argues that the trial judge violated his rights under both the 8th and 14th Amendments by basing his decision to impose the death penalty solely on his belief that the Petitioner could not be rehabilitated. In particular, Petitioner maintains that the trial judge violated his rights by using such a vague and arbitrary standard and for not providing adequate notice that he would use the standard. Respondent argues that the claim is both procedurally defaulted and meritless, as the state judge did not use a "rehabilitation" standard, and the Supreme Court has never held that considering the likelihood of rehabilitation was improper in a death penalty case.

1. Legal Standard

It is axiomatic that "notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure." *Lankford v. Idaho,* 500 U.S. 110, 126, 114 L. Ed. 2d 173, 111 S. Ct. 1723 (1991). Moreover, a capital sentencing system must provide a meaningful basis for distinguishing those cases in which the death penalty is imposed versus the majority of cases in which death is not imposed. *Godfrey v. Georgia,* 446 U.S. 420, 427, 64 L. Ed. 2d 398, 100 S. Ct. 1759 (1980). The capital sentencing system "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed

guidance,' and that 'make rationally reviewable the process for imposing a death sentence.'" *Id* at 428 (internal cites omitted) (vague standards not permissible). Considering whether a defendant is likely to pose a continuing danger to society in deciding whether to impose a death sentence is not unconstitutional. *Jurek v. Texas,* 428 U.S. 262, 272-76, 49 L. Ed. 2d 929, 96 S. Ct. 2950 (1976). *See also Skipper v. South Carolina,* 476 U.S. 1, 5, 90 L. Ed. 2d 1, 106 S. Ct. 1669 (1986) ("Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing . . . "). Evidence that a defendant would pose a future danger if not executed is an appropriate aggravating factor; conversely, evidence of the lack of future danger is a potential mitigating factor. *Skipper,* 476 U.S. at 5.

2. State Court Decision

The Illinois Supreme Court rejected this post-conviction claim.

With respect to defendant's argument regarding the trial judge's basis for imposing the death penalty, defendant contends that the trial judge refused to consider evidence which he presented during the aggravation and mitigation phase of the sentencing hearing. Instead, defendant contends that the judge focused exclusively on defendant's alleged inability to be rehabilitated and, further, that this was the judge's sole basis for imposing the death penalty. Defendant bases these contentions primarily on two comments made by the trial judge near the end of sentencing. In response to evidence that defendant's violent and dysfunctional upbringing made criminal action on his part essentially inevitable, the judge noted

that "[a] mitigating factor is not that it is inevitable that the defendant act out his aggressions against people and society, the mitigating factor is that there is some way to rehabilitate and change that and make sure that it will never happen again." Later, the judge also stated: "I don't think that Mr. Henderson is a person that I believe can be rehabilitated."

Defendant asserts that the trial judge's "rehabilitative potential" standard is vague and arbitrary, both facially and as applied, and that it was imposed upon him in violation of his constitutional rights under the eighth and fourteenth amendments (U.S. Const., amends. VIII, XIV). He asserts further that this standard was imposed without proper notice, and that if he had known the trial judge's sole focus was to be on his potential for rehabilitation, he could have prepared substantial evidence in mitigation. In response, the State maintains that defendant's argument is barred by principles of waiver and res judicata.

Initially, we note that defendant's "rehabilitative potential" argument was not squarely addressed in the direct appeal. In that appeal, defendant argued that the trial judge improperly considered the testimony given by a social worker during sentencing in aggravation, when the judge should have considered it in mitigation. The trial judge stated that the social worker's testimony, describing the defendant's violent and dysfunctional family history, caused him to believe that defendant could not be rehabilitated and would remain a danger to society. This court held that it was within the trial judge's discretion to consider the social worker's testimony in aggravation, and that the judge was not required to consider the family history of the defendant solely as mitigation evidence . . . This court made additional comments concerning the trial

judge's basis for imposing the death penalty, but the holding of the court on this issue was limited to the determination that the "trial judge did not err in his evaluation of [the social worker's] evidence." *Henderson*, 142 Ill. 2d at 341, 154 Ill. Dec. 785, 568 N.E.2d 1234.

However, while we agree that defendant's "rehabilitative potential" argument has not been previously considered by this court, we must conclude that the argument has been technically waived. Under the general rule, in a post-conviction proceeding, an issue is deemed waived when it could have been presented on direct appeal but was not . . . In the case at bar, defendant's "rehabilitative potential" argument is focused almost entirely on the statements and actions of the trial judge during the sentencing hearing, matters which were part of the trial record. Hence, defendant could have raised the "rehabilitative potential" argument on direct appeal, but chose not to.

In response, defendant points out that among the many exhibits attached to the post-conviction petition are copies of decisions from other capital cases presided over by the same judge who had sentenced defendant to death. In some of those cases, the judge had considered the respective defendant's potential for rehabilitation, while in others he had not. Defendant argues that these cases are evidence of the vague and arbitrary nature of the judge's "rehabilitative potential" standard and that, because these cases were not part of the record on direct appeal, his argument is not waived. . . . We disagree. It is well established that courts may take judicial notice of matters which are commonly known or, if not commonly known, are readily verifiable from sources of indisputable accuracy . . . The cases defendant offered with his post-conviction

petition are public documents which fall within the category of readily verifiable matters . . . If essential to his argument, defendant faced no bar in presenting these additional cases on direct appeal.

Furthermore, even assuming, arguendo, that defendant's "rehabilitative potential" argument has not been waived, it is nevertheless unsupported by the facts or by law. The underlying premise of defendant's argument – that his inability to be rehabilitated was the sole criterion used by the trial judge in imposing the death penalty – is unsupported by the facts before this court. A review of the record indicates that the trial judge plainly considered other factors in addition to the defendant's potential for rehabilitation when the court determined that defendant deserved the death penalty. Indeed, after hearing the evidence offered at sentencing, the trial judge explicitly recited and applied the statutory list of mitigating factors. Ill.Rev.Stat.1985, ch. 38, par. 9-1(c).

The judge took note of whether a lack of a prior history of criminal activity could mitigate against imposing the death penalty. (Ill.Rev.Stat.1985, ch. 38, par. 9-1 (c)(1).) The judge noted that defendant had struck a woman who attempted to retrieve a videotape from his apartment and, in a separate incident, had shot at her in a car. The judge also noted that defendant had struck his girlfriend and mother of his child in the head with a wrench, injuring her to the extent that she required hospitalization. Based on this evidence, the judge concluded that there was, in fact, "a significant history of prior criminal activity on behalf of Mr. Henderson."

The trial judge also determined that defendant was not under the influence of extreme mental or emotional

disturbance (Ill.Rev.Stat.1985, ch. 38, par. 9-1(c)(2)) and, further, that the victim was not a participant in the defendant's homicidal conduct and did not consent to the homicidal act (Ill.Rev.Stat.1985, ch. 38, par. 9-1(c)(3)). In considering whether defendant acted under the compulsion of a threat of imminent infliction of death or great bodily harm when he committed his crimes (Ill.Rev.Stat.1985, ch. 38, par. 9-1(c)(4)), the judge noted,

> "There is no such evidence here, in fact, not only was Mr. Henderson not compelled to do as he did, but he took the time to contemplate and reflect about what his acts would be while the girl was in the trunk of the car and while he rode around to decide what type of violence he would perpetrate upon her.
>
> As difficult as it was for me to understand at the time that I heard the evidence, but I heard it again and reviewed the transcript, with Kim Boyd locked and blindfolded and bound in the trunk of the car, he stops his automobile in a neighborhood he was familiar with to give a jump to another friend's car that couldn't be started, he was so overwrought, apparently, as he would like to say, with this quick action and this passionate reaction of violence that he took the time to use his mechanical skills to aid a friend.
>
> I find that is not mitigating in the least, I find it aggravating, and I find that it shows me that Mr. Henderson is a cold and calculating and uncaring individual who has taken this life with planning."

Finally, the trial judge noted that defendant was personally present during the commission of the murder. Ill.Rev.Stat.1985, ch. 38, par. 9-1(c)(3).

Summarizing, the record is clear that more was considered at sentencing than defendant's ability to be rehabilitated. The judge considered both the aggravating and mitigating evidence presented and made an "individualized determination on the basis of the character of the individual and the circumstances of the crime" (emphasis omitted) (*Zant v. Stephens* (1983), 462 U.S. 862, 879, 103 S. Ct. 2733, 2743-44, 77 L. Ed. 2d 235, 251) that defendant deserved the death penalty.

The lack of factual support for defendant's "rehabilitative potential" argument is paralleled by a lack of sound legal support. Defendant argues that the "the rehabilitative standard is vague on its face" because it is unclear under such a standard whether the sentencer is required to consider the potential that the defendant can be rehabilitated to useful citizenship in society, a "higher" standard, or whether the sentencer can consider that the defendant can be sufficiently rehabilitated to exist in a prison setting, a "lower" standard. We find no support for this proposition.

First, we note that there is no basis for concluding, as a matter of law, that there are "higher" and "lower" standards of rehabilitation. As the State correctly points out, incarceration need not presuppose continued criminality. To adopt defendant's argument on this issue would necessitate excluding the possibility that one may follow the precepts of accepted behavior while remaining in prison . . .

In addition, there is nothing inherently vague about considering, as a factor in sentencing, a defendant's potential for rehabilitation. (*Jurek v. Texas*, 428 U.S. 262, 274-76, 96 S. Ct. 2950, 2957-58, 49 L. Ed. 2d 929, 940-41

(opinion of Stevens, J., joined by Stewart and Powell, JJ.). Even though future behavior may not be easy to predict, "the fact that such a determination is difficult, however, does not mean that it cannot be made." (*Jurek*, 428 U.S. at 274-75, 96 S. Ct. at 2957, 49 L. Ed. 2d at 940.) Indeed, "both a backward-looking and a forward-looking inquiry are a permissible part of the sentencing process." *Tuilaepa v. California* (1994), 512 U.S. 967, 977, 114 S. Ct. 2630, 2637, 129 L. Ed. 2d 750, 762.

Defendant argues further that the trial judge's "rehabilitative potential" standard is unconstitutional because of its arbitrary application. In support, defendant points to decisions from other capital cases presided over by the same judge who sentenced defendant in the case at bar to death. In some of those cases, the judge had considered the respective defendant's potential for rehabilitation, while in others he had not.

As a general matter, it is well established that a trial court has discretion to consider virtually all relevant evidence during sentencing. As this court has noted, "in determining the appropriate sentence, the trial judge is to consider all matters reflecting upon the defendant's personality, propensities, purposes, tendencies, and indeed every aspect of his life relevant to the sentencing proceeding. . . . As a general proposition, any evidence regarding the defendant's character is relevant and admissible . . . In capital cases, the trial court is constitutionally required under the eighth amendment to consider the character and record of the defendant and the circumstances of the offense so that the defendant receives a truly individualized sentencing. (*Woodson v. North Carolina* (1976), 428 U.S. 280, 303-04, 96 S. Ct. 2978, 2991, 49 L. Ed. 2d 944, 961.) Moreover, because of the constitutional requirement

of individualized sentencing, the sentencer may be given "'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.'" *Tuilaepa*, 512 U.S. 967 at ___, 114 S. Ct. at 2639, 129 L. Ed. 2d at 764, quoting *Zant v. Stephens* (1983), 462 U.S. 862, 875, 103 S. Ct. 2733, 2742, 77 L. Ed. 2d 235, 248.

In the case at bar, defendant's inability to be rehabilitated was viewed as an aggravating factor in the second phase of the sentencing hearing. Given the discretion that is afforded the trial judge at that stage, we cannot conclude that the judge in the instant case acted arbitrarily by considering defendant's potential for rehabilitation, regardless of whether he considered that potential in other capital cases. (*See Tuilaepa*, 512 U.S. 967 at ___ n.21, 114 S. Ct. at 2646 n. 21, 129 L. Ed. 2d at 773 n. 21 (Blackmun, J., dissenting) (arbitrariness challenge to sentencing factor "would require something more than merely pointing to others who committed similar offenses and did not receive the death penalty").) Furthermore, as this court has noted previously, "it has not been our practice to review and compare sentences when they arise from different operative facts." . . . We therefore decline to review and compare the cases which defendant submitted with his post-conviction petition.

Finally, we note that defendant is in error in his reliance on *Lankford v. Idaho* (1991), 500 U.S. 110, 111 S. Ct. 1723, 114 L. Ed. 2d 173, to support the proposition that he was entitled to notice of the trial judge's "rehabilitative potential" standard. In *Lankford*, the State of Idaho, through a presentencing order, advised the trial court that it was not seeking the death penalty. During the sentencing hearing, the defendant did not present any mitigating

evidence but, instead, simply argued the merits of different prison terms. Nevertheless, the trial court, sua sponte, determined that the defendant should be sentenced to death. On review, the United States Supreme Court concluded that the defendant was denied due process because he did not have "adequate notice of the critical issue that the judge was actually debating." (*Lankford*, 500 U.S. at 120, 111 S. Ct. at 1729, 114 L. Ed. 2d at 184.) Unlike the situation in *Lankford*, the defendant in the case at bar had notice that the State was seeking the death penalty. Thus, defendant was aware that his character, which included his rehabilitative potential, could be relied upon by the trial judge in determining his sentence.

In regard to the first contention in this appeal, that the trial court used a vague and arbitrary standard to determine whether the death penalty should be imposed, defendant has failed to establish that a substantial constitutional violation occurred. Therefore, we hold that the circuit court properly dismissed defendant's post-conviction claim that the trial judge used an unconstitutional "rehabilitative potential" standard in sentencing defendant to death.

See 171 Ill. 2d at 132-39, 662 N.E.2d at 1292-98, 215 Ill. Dec. at 152-56.

3. Analysis

Respondent is correct that the Illinois Supreme Court found that this claim was technically waived. The finding of waiver, based on Petitioner's failure to raise the issue on direct appeal, would clearly be "independent and adequate state law ground," and Petitioner has not attempted to excuse the waiver by showing cause and prejudice or a

miscarriage of justice. However, the Illinois Supreme Court considered the claim on the merits as an alternative grounds for its decision, so we will deem it preserved for our review. We note at the outset that the Illinois Supreme Court cited relevant Supreme Court caselaw in its analysis.

On the notice issue, Petitioner's claim fails. First, as noted by the Illinois court, his reliance *Lankford v. Idaho,* 500 U.S. 110, 114 L. Ed. 2d 173, 111 S. Ct. 1723 (1991) is misplaced; that case dealt with a defendant not having notice that he might be sentenced to death, not what particular factors would be considered. Second, as addressed in the previous section, the trial judge did not apply a "rehabilitation" standard, but instead carefully considered all the statutory factors and all the aggravating/mitigating evidence.

Petitioner over weights certain isolated statements by the trial judge, in particular: "A mitigating factor is not that it is inevitable that the defendant act out his aggressions against people and society, the mitigating factor is that there is some way to rehabilitate and change that and make sure that it will never happen again." Petitioner's Memorandum in Support, p. 69 (quoting State Criminal Trial Record at R 2379-80). In the context of the decision as a whole, this comment by the trial judge seems to harken back to the issue in the previous section: that the trial judge took the Petitioner's evidence offered in "mitigation" as simply evidence of his continued dangerousness. *See generally Parke,* 130 F.3d at 784-85. The comments do

not indicate that the judge viewed rehabilitation as the relevant legal standard.[11]

Moreover, the trial judge was in no way foreclosed from considering the Petitioner's rehabilitation in his decision. This court notes that the Illinois statute specifically provides that the list of statutory mitigating and aggravating factors is not exclusive. *See* 720 ILCS 5/9-1 (c); *Coleman v. Ryan,* 196 F.3d 793, 798 (7th Cir. 1999). On that score, assessing the likelihood of rehabilitation is equivalent to assessing likelihood of future dangerousness, which passed muster under *Jurek. See also Williams,* 120 S. Ct. at 1515 (the state court "correctly emphasized the strength of the prosecutions evidence supporting the future dangerousness aggravating circumstance"). Lastly, the Petitioner attempts to be, at least indirectly, arguing his rehabilitation (the proposed testimony of Dr. Hillman and Rev. McLean) as a reason that a death sentence is not appropriate, which makes his claim rehabilitation is an inappropriate factor is a bit disingenuous.

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[11] Indeed, very little, if any, evidence of rehabilitation was presented for the Petitioner. His trial counsel presented testimony by a female friend, who has maintained a relationship with Petitioner, and the trial judge interpreted that as a claim of rehabilitation. Mr. McLean testified for both Petitioner and codefendant Croft, but only testified about rehabilitation for Croft, and instead focused on Petitioner's remorse. (State Criminal Trial Record at pp. 2189-90, 2289-90.) When asked by the prosecutor about Petitioner's rehabilitation, McLean essentially demurred. (State Criminal Trial Record at 2294.) The prosecutor may have been misled by defense counsel asking McLean if his answers (as to background) were the same for Petitioner as for Croft. (State Criminal Trial Record at pp. 2287.)

F. Ineffective Assistance-Failure to Submit Medical Evidence in Support of Motion to Suppress

Petitioner argues that defense counsel was ineffective in not requesting, developing, and presenting medical evidence to support his claim that his confession was the product of physical coercion. Petitioner maintains that, if such information had been presented, there is a reasonable probability that his confession would have been suppressed, which would likely have resulted in his acquittal (as the confession was the prosecution's strongest evidence) or, at the very least, spared him the death penalty (as the confession provided gruesome details about the murder).[12] Respondent maintains that the Illinois courts properly evaluated the claim, in particular noting that the evidence as to the timing of the Petitioner's ear injury is ambiguous.

1. Legal Standard

To establish ineffective assistance of counsel, a defendant must show that counsel's representation "fell below an objective standard of reasonableness" and that counsel's "deficient performance prejudiced the defense." *Williams,* 120 S. Ct. at 1511 (citing *Strickland v. Washington,* 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)). Prejudice is defined as a reasonable probability that, but for counsel's mistake, the result in the case

[12] In support of his claim, Petitioner moved to depose trial counsel and for appointment of a medical expert to examine his ear. This court denied the motion in its memorandum opinion and order of July 10, 1997 ("Order I"). Petitioner's Rule 59 Motion to reconsider this decision was denied by this court on March 11, 1998.

would have been different. *Strickland,* 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decision maker, such as unusual propensities toward harshness or leniency." *Id.* at 695. In reviewing a claim of ineffective assistance, the court must "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. For purposes of AEDPA, "it is past question that the rule set forth in Strickland qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States .'" *Williams,* 120 S. Ct. at 1512.

2. State Court Decision

The Illinois Supreme Court rejected this post-conviction claim.

Defendant contends that he received ineffective assistance of counsel during his suppression hearing because trial counsel failed to present medical records which support his claim that he was physically coerced into giving his statement. During the suppression hearing, defendant argued, inter alia, that he was tired and physically ill during his interrogation; that he was isolated for several hours and was not permitted to make a phone call to contact his family; and that he was impermissibly confronted with a codefendant who made an incriminating statement in his presence. Most importantly, defendant argued that the police officers who interrogated him

slapped and punched him and struck him with a telephone book until he gave his confession.

In response to these arguments, the State presented considerable evidence to establish that defendant's statement was given voluntarily. The State's witnesses, including the police officers and the assistant State's Attorney who took defendant's statement, testified that none of them had struck or punched defendant. The assistant State's Attorney also testified that defendant never complained to him about being struck by the police officers. Defendant's signed statement indicated that he had been treated fairly and that no threats or promises had been made in exchange for the statement. A photograph of defendant which was taken after he gave his statement, and which was shown to him at the suppression hearing, showed no obvious signs of injury. Significantly, on cross-examination during the hearing, defendant testified that during a prison intake examination which took place out of the presence of the police officers and the assistant State's Attorney on the day after his arrest, he did not complain of any injuries and, in fact, stated that he was in good health. Defendant also testified on cross-examination that his ear "was not bothering" him at the time of the intake examination.

At the suppression hearing, the trial judge found defendant's version of the events surrounding the confession not "worthy of belief." In particular, the judge found it difficult to believe that defendant never mentioned the alleged beatings to the assistant State's Attorney, even though, according to defendant, the assistant State's Attorney entered the interrogation room immediately after the alleged beatings took place in order to record defendant's statement. With respect to defendant's claim that he

was denied a phone call, the judge noted that the purpose of the phone call is to provide notice of being in custody to one's family. Since defendant's mother had been present at his arrest and had, in fact, seen him at the police station, notice had been achieved. The judge also found that the police had not confronted defendant with the codefendant on their own initiative but, rather, that defendant himself had requested the confrontation. Based on these findings, the trial court denied defendant's motion to suppress.

Subsequently, in his post-conviction petition, defendant alleged that newly discovered medical records indicated that he had suffered an ear injury and permanent hearing loss at the hands of the police. These medical records consisted of "progress notes" taken during several medical examinations of defendant while he was in prison beginning sometime in 1986 and ending in April 1988. Defendant asserts that trial counsel's failure to present this evidence constitutes a prima facie case of ineffectiveness and, therefore, that the circuit court erred in denying his post-conviction petition. We disagree.

In order to sustain a claim of ineffective assistance of counsel, defendant must show that trial counsel's performance fell below that of a reasonable attorney, and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland v. Washington* (1984), 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (adopted by this court in *People v. Albanese* (1984), 104 Ill. 2d 504, 525-26, 85 Ill. Dec. 441, 473 N.E.2d 1246).) This, defendant has failed to do.

The first medical record in the post-conviction petition, which is dated only "1986," indicates that defendant

claimed he was hit in the left ear by the Chicago police during his interrogation on July 17-18, 1986. There is a notation on the record reading: "TM intact – small ant area – possible healed perforation but non specific" and a note that defendant was to see an ear, nose and throat doctor on "Friday." The second record, dated December 30, 1986, notes that defendant complained of earaches, that he had wax in his left ear, and that he was given medication. The next two records indicate defendant had ear wax and that he complained of having bronchitis. In a fifth record dated March 24, 1987, defendant complained of having an earache, dizziness and headaches. A notation in that record reads "One enmate [sic] hit him on the L side of the head." In a sixth record dated April 7, 1987, defendant complained of having "testicle edema." In addition, there was a notation reading "Head Trauma 2d fight." The seventh record, dated April 24, 1987, contains a notation reading: "I not [sic] convinced that any of probable [hearing loss] from alleged beating so I feel we need complete audiogram since defendant feels this will be used in trial." The eighth, and final, record is dated April 11, 1988. It notes that defendant has a hearing loss and that he had been fitted with a hearing aid.

The suppression hearing was held in April 1987. Thus, the record which definitively establishes defendant's hearing loss (the final record dated April 11, 1988) was not available until one year after the hearing. Defendant's trial counsel therefore cannot be faulted for failing to present a medical record which did not exist at the time of the hearing.

Moreover, the remaining medical records are ambiguous in their support for defendant's position. While the first record notes defendant's complaint that the police

struck him, the record is dated only "1986." Because the record notes that a follow-up appointment was scheduled, and because the next record is dated December 30, 1986, it is possible to interpret these records as supporting the argument that defendant's first complaint of police mistreatment was not made until several months after the interrogation took place in July 1986, an interpretation which weighs against defendant's allegations of police misconduct. . . . In addition, because of the reference to a "2d fight" in the record dated April 7, 1987, it is possible to interpret the medical records as supporting the argument that defendant suffered injuries while in prison, and that those injuries were the source of his hearing loss.

In sum, the medical records are not particularly helpful to defendant; it is impossible to tell from them when defendant's hearing loss occurred or how it occurred, and inferences may be drawn from them which are detrimental to defendant's position. Given these facts, we cannot say that the failure to present the medical records substantially shows that defendant's trial counsel was not rendering "reasonably effective assistance" within the range of "competence demanded of attorneys in criminal cases." *Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2064, 80 L. Ed. 2d at 693.

Further, in view of the evidence offered by the State to support its claim of voluntariness, including the detailed confession, the police and assistant State's Attorney's testimony, and, in particular, the lack of any complaints of injury by defendant, we cannot say that these records establish a reasonable probability that the outcome of the suppression hearing would have been different had they been available. Therefore, we conclude that the circuit

court was correct to deny an evidentiary hearing on this matter.

See 171 Ill. 2d at 140-44, 662 N.E.2d at 1296-98, 215 Ill. Dec. at 156-58.

3. Analysis

At the outset, we note that the Illinois court cited *Strickland* and applied the proper standard. We also note that the Illinois court, in its factual review, did make one mistake. As noted in Order I, and conceded by Respondent (Memorandum in Response at p. 15 n. 2), the Illinois Court incorrectly stated that the first treatment note was dated "1986" (rather than 8/19/86). This led them to incorrectly postulate that the injury could have been months after the July 1986 interrogation. Despite this error, Petitioner cannot prevail on his claim.

There is no prejudice if the evidence defense counsel fails to present is so vague or contradictory that it is unlikely to have altered the result in the case. *Spreitzer v. Peters,* 114 F.3d 1435, 1455-56 (7th Cir. 1997), *cert. denied,* 522 U.S. 1120, 140 L. Ed. 2d 121, 118 S. Ct. 1060 (1998). As noted in Order I, nothing in the medical records (nor the opinion of an expert) could establish with any degree of certainty than Petitioner's ear ailment came as a result from a beating by police officers. On the contrary, given the repeated references to Petitioner's involvement in prison fights, the medical records create a strong inference that the injury was inflicted by a fellow inmate. Add the testimony of the officers and assistant states attorney and the lack of apparent injury at trial, and there is nothing unreasonable about the Illinois court's conclusion.

While one of our brother judges reached the opposite conclusion in a recent case, those facts were far more egregious, and included the officers being implicated in other instances of torture and a statement by the public defender that he had seen evidence of the beating and had photographed the bruises. *See U.S. ex rel. Maxwell v. Gilmore,* 37 F. Supp. 2d 1078 (N.D. Ill. 1999) (J. Shadur). Lastly, we note that Petitioner's own legal expert, Randall Porter, opined in his report that there was "no hard evidence upon which to attack the confession." (State Post-Conviction Record at p. 306.)

G. Ineffective Assistance-Failure to Investigate/Present Mitigating Evidence

Lastly, Petitioner claims that he received ineffective assistance of counsel at his sentencing hearing. Petitioner initially maintained that the defense counsel: (1) failed to have a cohesive strategy for the death penalty hearing; (2) did not begin preparing for the sentencing hearing until after trial; (3) subverted Petitioner's position by pursuing a bogus alibi defense (which undermined Petitioner's mother and grandmother's credibility); (4) utilized an unqualified social worker rather than a psychiatrist; (5) failed to properly prepare the witnesses that he did present; and (6) failed to investigate and present other available mitigating evidence.[13] Significantly, Petitioner later conceded that trial counsel followed the proper mitigation strategy. However, he maintains that counsel did not

[13] Petitioner also argues that a hearing is necessary in order to determine if defense counsel based any of these challenged decisions upon any sort of strategy.

pursue it aggressively enough, in terms of both his investigation of mitigating evidence and presentation to the court. Respondent argues that the claim is meritless.

1. Legal Standard

The Supreme Court has held that the failure to investigate and present substantial mitigating evidence at a death penalty proceeding can constitute ineffective assistance of counsel under the *Strickland* standard. *Williams,* 120 S. Ct. at 1514-16. In *Williams,* the errors the Court found most egregious were: (1) taking less than a week to prepare for the sentencing phase; (2) failing to discover and present evidence of defendant's "nightmarish childhood"; (3) failing to discover and present evidence that defendant was borderline retarded and essentially uneducated; (4) failing to discover and present evidence of defendant's commendable prison disciplinary record; and (5) failing to contact a potentially helpful witness. *Id.* at 1514.[14] *See also Hall,* 106 F.3d at 749 ("defense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigating factors"); *Emerson v. Gramley,*

[14] The defense counsel in *Williams* did little at the sentencing hearing. He presented the brief (and poorly prepared) testimony of defendant's mother and two neighbors (describing him as a "nice boy") and a taped statement of a psychiatrist (recounting defendant's statement that he removed bullets from his gun at early robberies to be sure not to injure anyone). *Williams,* 120 S. Ct. at 1500. His closing argument emphasized defendant's act of confessing, but repeatedly conceded it would be hard show the defendant any mercy given the nature of his crimes. *Id.*

91 F.3d 898, 906-7 (7th Cir. 1996), *cert. denied,* 520 U.S. 1122, 137 L. Ed. 2d 339, 117 S. Ct. 1260 (1997) (ineffective assistance where counsel did not investigate, present, or argue mitigating evidence); *Brewer v. Aiken,* 935 F.2d 850, 857-9 (7th Cir. 1990) (ineffective assistance where counsel presented no evidence of defendant's mental shortcomings and troubled personal history). While *Strickland* requires counsel to conduct a reasonable investigation, "[a] reasonable investigation is not, however, the investigation that the best criminal defense lawyer in the world, blessed not only with unlimited time and resources but also with the inestimable benefit of hindsight, would conduct." *Thomas v. Gilmore,* 144 F.3d 513, 515 (7th Cir. 1998), *cert. denied,* 525 U.S. 1123, 142 L. Ed. 2d 905, 119 S. Ct. 907 (1999). *See also Britz,* 192 F.3d at 1104 (There is no prejudice if further investigation by the attorney would have turned up nothing useful).

2. State Court Decision

On direct appeal, the Illinois Supreme Court completely rejected Petitioner's claim.

In addition to challenging the sentencing judge's assessment of the evidence of defendant's upbringing and family environment, defendant challenges his trial counsel's failure to request the court to appoint a psychiatrist to further evaluate defendant. According to defendant, the information in the psychosocial evaluation prepared by Ms. Dinguss, who was only a social worker with a master's degree in social work and not a psychiatrist or psychologist, was such that his trial counsel should have sought a "full psychiatric workup"; by failing to do so his trial counsel was ineffective and deprived defendant of his sixth

amendment right to effective counsel (*Strickland v. Washington* (1984), 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674).

As well as being based upon Ms. Dinguss' professional status, this claim is also based upon the statements in Ms. Dinguss' report that, while defendant's relationship with his mother seems to have been "the catalyst which escalated the defendant's anger toward women in general but specifically his mother," "a thorough psychiatric work-up would need to be conducted before any definitive statements could be made in this regard," and Ms. Dinguss found it "impossible to determine precisely with this limited amount of information" the extent of the "psychological trauma" defendant suffered as a result of his upbringing. Defendant's appellate counsel argued this claim of ineffective trial counsel to the trial judge, and also moved post-trial for the appointment of a psychiatrist; as support, counsel presented a letter from a psychiatrist expressing surprise that certain tests and investigations had not been performed before defendant was sentenced. But, in deciding whether trial counsel acted ineffectively in failing to request appointment of a psychiatrist, the only relevant information is that which was available to trial counsel; therefore, we look only at Ms. Dinguss' psychosocial evaluation and testimony, not the subsequent letter of a psychiatrist who was never qualified as an expert.

In *Strickland*, the Supreme Court stated that in analyzing a claim of ineffective assistance of counsel "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," a presumption that a defendant has to overcome. (*Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065,

80 L. Ed. 2d at 694.) Further, "the proper measure of attorney performance remains simply reasonableness under prevailing professional norms." (*Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694.) In the present case, defendant's trial counsel acted reasonably and effectively in requesting a psychosocial evaluation from the social services department and relying on that report alone, because counsel was merely developing mitigating evidence of defendant's troubled upbringing and family life and their effect on his outlook and attitudes in order to provide at least a partial explanation for why he had committed these horrendous crimes; this report adequately documented defendant's upbringing and its possible effect on him given the inexactitude of psychiatry. Trial counsel was not attempting to establish that defendant suffered from mental illness or insanity at the time of the offense or the trial, or that defendant had some other legal excuse; and there was no evidence during the guilt-innocence or the sentencing phase of the trial that defendant had shown signs of mental illness or psychiatric instability at any time during his life. Given the parameters of counsel's objective in securing the social services report, it was completely reasonable that counsel did not seek appointment of a psychiatrist in order to "precisely" determine the extent of the "psychological trauma" defendant had suffered while growing up (assuming precision is attainable in the field of psychiatry).

The two cases cited by defendant to support his claim only confirm our conclusion. In *Ake v. Oklahoma* (1985), 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53, the Court held that an indigent defendant who shows that his sanity at the time of the offense is likely to be a significant issue at trial has a constitutional right to the assistance of a

competent psychiatrist; psychiatric assistance is not constitutionally mandated in every case. Any significance *Ake* may have to the current issue, whether defense counsel is ineffective for failing to request appointment of a psychiatrist to further develop mitigating evidence of an indigent defendant's troubled upbringing, is clearly unfavorable to defendant's position for he makes no claim that he was mentally ill or insane at any time. Nor is defendant's argument strengthened by this court's decision in *People v. Stewart* (1984), 101 Ill. 2d 470, 79 Ill. Dec. 123, 463 N.E.2d 677. In *Stewart*, this court acknowledged that there are valid reasons for mental examinations in some cases, such as showing that a defendant acted under extreme mental disturbance, that there are mitigating aspects of a defendant's character or personality, and that a defendant has rehabilitative potential. But while these are "valid reasons to conduct a mental examination, there must be, in the discretion of the judge, some indication that evidence of these mitigating factors and rehabilitative potential might be present" before an examination will be ordered . . . . Because the defendant in Stewart had not put his mental condition in issue, and even his own witnesses had not indicated that he had ever had any mental problems, this court held that the trial court did not err in denying his request for a mental examination. As in *Stewart*, in our case defendant has not claimed or "presented any evidence to demonstrate that his mental condition was abnormal at any time." . . .

In *Stewart*, we also distinguished two other cases relied upon by defendant here; in *People v. Gleckler* (1980), 82 Ill. 2d 145, 44 Ill. Dec. 483, 411 N.E.2d 849, a defense of compulsion was raised, and in *People v. Carlson* (1980), 79 Ill. 2d 564, 38 Ill. Dec. 809, 404 N.E.2d 233, a defense of

insanity was raised. In those cases psychiatric evidence had great value because the mental condition of the defendants was directly at issue. The value psychiatric evidence would have had in the present case is comparatively low: defendant never put his mental condition in issue and merely contends that if there had been an expert psychiatric examination, in addition to the social services evaluation, it might have produced additional mitigating evidence by developing a clearer picture of the effect his upbringing had on his character and his capacity to commit these crimes. We refuse to conclude that defendant's trial counsel was ineffective because he failed to request this additional examination at the sentencing stage of the trial when defendant's mental condition was not at issue and when we can only speculate that such an examination would have developed evidence of any mitigating value beyond that which had already been developed in Ms. Dinguss' report, much less of such significant value as to have affected the judge's sentencing decision.

See 142 Ill. 2d at 341-5, 568 N.E.2d at 1274-5, 154 Ill. Dec. at 825-6.

The Illinois Supreme Court was no more receptive to this claim in Petitioner's post-conviction appeal.

Defendant contends that trial counsel was ineffective during the sentencing hearing in two ways. First, defendant contends that trial counsel failed to "develop and articulate a cohesive theory of mitigation" prior to sentencing. Second, defendant contends that trial counsel's presentation of mitigation evidence was inadequate. To sustain his claim of ineffective assistance of counsel at this stage, defendant must establish that counsel's actions were objectively deficient and that, absent counsel's errors,

there is a reasonable probability that the judge "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698.

1. Failure to Have Coherent Mitigation Plan

Defendant asserts that in the case at bar, "there was no real chance to avoid a guilty verdict" and that, therefore, trial counsel's failure to develop a "coherent" mitigation plan prior to sentencing meant his performance fell below "the normal standard of care." In support of this assertion, defendant principally relies on two affidavits and a letter which were included with his post-conviction petition. In the first affidavit, Mildred Lincoln, a friend of the family who testified at the sentencing hearing, stated that she did not have contact with trial counsel until after the verdict had been reached. In the second affidavit, Rev. Gordon McLean, a prison chaplain who also testified on defendant's behalf, indicated that he was first approached by trial counsel in the middle of the sentencing hearing. In the letter, which was sent after the verdict had been reached, trial counsel asked defendant's mother if she knew of anyone who could testify on defendant's behalf at his sentencing hearing.

Defendant further maintains that in addition to being inadequately prepared, trial counsel used a strategy during the guilt-innocence phase of trial which prejudiced his sentencing hearing. Specifically, defendant maintains that, without his knowledge, trial counsel requested that his mother and grandmother commit perjury by testifying

as to his whereabouts on the night of the murder. Defendant maintains that because of the resulting loss of credibility, trial counsel was precluded from calling his mother and grandmother as important mitigating witnesses at the sentencing hearing.

To analyze defendant's claims, we summarize the evidence which he presented at the sentencing hearing. Three witnesses testified in mitigation. First to testify was Sheri Dinguss, a caseworker for the Cook County social services department. Dinguss had prepared a psychosocial evaluation of defendant based on interviews with defendant and his family. Dinguss was of the opinion that defendant's upbringing was "severely dysfunctional." The nature and extent of this dysfunction was summarized in this court's opinion on direct appeal:

> "Defendant, an only child, was raised by his mother, his father having been shot and killed by his mother's uncle before defendant reached his first birthday; this same uncle was shot and killed by his own wife; defendant's grandfather committed suicide; defendant's mother was sexually promiscuous throughout his childhood, a situation he resented, and defendant had been abused by men; his mother had also been molested to some degree by her father and uncle; defendant said his female cousins had molested him; as for defendant's past behavior, he had been involved in gangs, had hit women with his hands and hit the mother of one of his many children with a wrench, and had shot at a woman on a public street." *Henderson*, 142 Ill. 2d at 335-36, 154 Ill. Dec. 785, 568 N.E.2d 1234.

Although there was no evidence that defendant had ever been physically abused, Dinguss believed that he had

been emotionally abused by his mother and had suffered some "psychological trauma" from his upbringing. Dinguss also believed that defendant's violent behavior would continue unless he received "long-term intensive psychotherapeutic intervention." Trial counsel also called Mildred Lincoln, a licensed social worker and program director for the homeless at Catholic Charities. Lincoln was a close friend of defendant's family. Lincoln testified that defendant was a very insecure person who needed to be accepted by others and who often did things to get others to like him. She testified that she was confused when she heard that defendant had committed murder because, in her experience, defendant had always shied away from violence. She did not believe that defendant was the kind of person who could have planned the murder and she knew that he was not cruel. In addition, she noted that any lack of remorse by defendant was due to his need to "act like the big man" because of his feelings of insecurity.

The final witness to present mitigating testimony was Rev. Gordon McLean, a chaplain at Cook County jail. Rev. McLean testified that he had spoken with defendant approximately 20 to 25 times, both before, during and after his trial. During one of their conversations, Rev. McLean asked defendant whether he could sympathize with the feelings of the victim's family. According to Rev. McLean, defendant began to cry and said "that was a terrible thing, I wish I had never had any part of it, but I did, I would give anything that I could possibly imagine or have or do if that young girl could be alive and back with her family, but that can never happen and I'm responsible for that." Rev. McLean testified further that he was surprised at defendant's response and felt he was "being genuine."

In light of the foregoing testimony, we fail to see how the letter and affidavits which defendant has presented establish that trial counsel did not have a "coherent" strategy prior to the sentencing hearing. Trial counsel attempted to show that defendant was a deeply troubled individual whose dysfunctional upbringing made his actions, if not excusable, at least understandable. If trial counsel was unsuccessful in his arguments for leniency, that does not mean that his efforts lacked coherence . . . .

Defendant would liken the case at bar to *Brewer v. Aiken* (7th Cir. 1991), 935 F.2d 850. In *Brewer*, the defendant's attorney was unaware that, under a new Indiana death penalty statute, the sentencing hearing would immediately follow the guilt phase of the trial. The attorney requested a continuance but was refused, thereby denying the attorney time to investigate information he had just received regarding the defendant's mental history. At the sentencing hearing, the defendant was subjected to "devastating" cross-examination which showed that he had committed perjury. The defendant's attorney never questioned him about his mental history and, indeed, elected not to present any mitigating evidence. (*Brewer*, 935 F.2d at 851-52.) The reviewing court determined that the defendant had received ineffective assistance of counsel because there was a reasonable probability that, absent his attorney's errors, the outcome of the proceeding might have been different. *Brewer*, 935 F.2d at 860.

Defendant's reliance on Brewer is misplaced. In the case at bar, trial counsel used the time between the trial and the sentencing hearing to request the psycho-social evaluation prepared by Dinguss and to seek out further mitigating witnesses from defendant's mother. He presented the testimony of Dinguss, Lincoln and Rev. McLean

in an attempt to explain defendant's actions, to humanize him and to show his remorse. Indeed, defendant has alleged nothing which would overcome the "strong presumption" that trial counsel's preparation for the sentencing hearing fell "within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 694.

Nor are we persuaded that trial counsel knowingly requested defendant's mother and grandmother to commit perjury. In affidavits attached to the post-conviction petition, both women state merely that they "understood [trial counsel] to mean" that he wanted them to say defendant was home with his family. Further, while trial counsel was not precluded from calling defendant's mother and grandmother as mitigation witnesses, evidence in the record indicates that he may have had reason not to. Dinguss testified that she believed defendant's mother had "serious psychological problems" and that she had emotionally abused defendant. According to the affidavit of a family friend, defendant's grandmother "drank regularly and to the point of being drunk." According to her own affidavit, defendant's grandmother at one time suspected that defendant's mother, or some of her boyfriends, had molested defendant. Given this information, trial counsel's decision not to call defendant's mother and grandmother as mitigating witnesses fell within "the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' [Citation.]" *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065, 80 L. Ed. 2d at 695 . . .

2. Inadequate Presentation of Mitigation Evidence

Along with his post-conviction petition, defendant presented a psychological evaluation prepared by Dr. Kip Hillman, a clinical psychologist. Dr. Hillman interviewed defendant and had him undergo a number of psychological tests. Dr. Hillman determined that defendant had an IQ in the range of 75 to 85, that his "performance on abstract tasks was slightly above the level of mild mental retardation," and that he had a "severe character disorder of the borderline type." In addition, Dr. Hillman was of the opinion that defendant was suffering from an extreme mental and emotional disturbance at the time of the crimes. *See* Ill.Rev.Stat.1985, ch. 38, par. 9-1(c)(2).

Defendant contends that Dr. Hillman's findings were readily available to trial counsel. He contends further that there was no strategic reason for trial counsel not to have discovered or presented this information and that his failure to do so is evidence of his ineffectiveness. In response, the State asserts that this issue was previously considered in this court's opinion on direct appeal and therefore is res judicata.

On direct appeal, defendant argued that his trial counsel was ineffective for failing to request a psychiatric examination when, in her psycho-social evaluation, Dinguss had noted that a "thorough psychiatric workup" was needed to determine precisely the extent of defendant's psychological trauma. This court held that trial counsel acted effectively in relying on the psycho-social evaluation alone because defendant's mental condition was not at issue and because it was speculative to consider what additional mitigating evidence a psychiatric examination might have produced. (*Henderson*, 142 Ill. 2d at 341-45,

154 Ill. Dec. 785, 568 N.E.2d 1234.) However, Dr. Hillman's findings were not part of the record on direct appeal. Because rules of waiver and res judicata are relaxed when the evidence of counsel's deficiency is not part of the trial record . . . , we will consider the merits of defendant's claims. . . .

In the alternative to its res judicata argument, the State asserts that even if trial counsel's failure to present Dr. Hillman's findings was professionally unreasonable, defendant nevertheless did not suffer any prejudice from that failure. We agree. After carefully reviewing Dr. Hillman's report, we conclude that defendant has failed to demonstrate a reasonable probability that, had the report been available, the trial judge would have determined that defendant did not deserve the death penalty. First, much of Dr. Hillman's report simply restates details of defendant's troubled upbringing and family background. This information was not only cumulative to Dinguss' testimony but could have been considered aggravating as well. (*Henderson*, 142 Ill. 2d at 336-41, 154 Ill. Dec. 785, 568 N.E.2d 1234.) Similarly, it is not clear that the trial judge would have reacted sympathetically to Dr. Hillman's conclusions that defendant had a low IQ, that he suffered from a severe character disorder and that he had adapted to his environment by "aggressive acting out through fighting and sexual activity." . . . ; *Penry v. Lynaugh* (1989), 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (characterizing evidence of mental retardation and abuse as having potential to be both mitigating and aggravating).) That these conclusions would have been given little consideration as mitigating evidence is especially likely given the context in which they would have been offered. As the trial judge noted, having a psychologist "throw his

opinion into the record" would not have assisted him in his sentencing decision because he had not "heard from any person who [knew defendant] intimately, nor from any person who was engaged with part of his life, including the young lady who was never married to him or was a girlfriend by whom he had a child who testified here that no one ever said he exhibited any psychiatric instability or that he in any way exhibited any type of conduct or behavior which lead them to believe that he was in need of treatment."

Nor is it reasonably likely, based on Dr. Hillman's findings, that the trial judge would have concluded that defendant was under the influence of an extreme emotional disturbance at the time of the murder, and that his mind was at "'such a fragile point as to leave him with little to no emotional control.'" . . . Prior to the murder, defendant helped orchestrate a group sexual assault of the victim which took place over an extended period of time. After the assault, according to the statement which he made to the police, defendant was responsible for persuading his codefendants that they should kill the victim. Defendant helped place the victim in the trunk of his car. With the victim in his trunk he stopped and gave a jump start to a friend's car. He then intentionally evaded several of his codefendants who were following him in a second car so they would not be present for the murder. When defendant opened the trunk of his car, again according to his statement, the victim stated that she could "explain." In response, defendant helped stab the victim over 40 times. When the stabbings failed to kill the victim, the defendant stated that he would run her over and that he would, in his words, "take responsibility for the car." He then drove over the victim three times until she was dead. Based on

these facts the trial judge determined that defendant was a "cold," "calculating" and "uncaring individual" who had taken the victim's life "with planning." We consider it highly unlikely that Dr. Hillman's report would have changed this determination.

. . .

Defendant also contends that trial counsel was ineffective for failing to present high school records which purportedly establish that defendant was learning disabled. These school records, which were part of the post-conviction petition, consist of various conference reports, teacher evaluations, progress reports, grades and other information. The records plainly show that defendant was placed in special education classes. Several of the forms indicate that defendant was to be placed in the "LD [learning disabled] EH [educationally handicapped] program," or that he was to take "EH-LD classes [and] mainstream when appropriate." In addition, the school records show that the majority of defendant's grades were quite poor.

But perhaps the clearest indication of the school's psychological evaluation of defendant can be found on a multipurpose conference report form which appears several times among the school records. A section of this form is titled "Exceptional Characteristics." In this section is a listing of various descriptive phrases, or characteristics, including "educationally handicapped" and "learning disabled." Next to each of the listed characteristics are two empty boxes, respectively under column headings labeled "primary" and "secondary." According to instructions included among the records, the "Exceptional Characteristics" list is included on the form to satisfy the require-

ments of "P.L. 94-142," an apparent reference to the Education for All Handicapped Children Act of 1975 (20 U.S.C. SS 1232, 1401, 1405, 1406, 1411 et seq., 1453 (1988)). The instructions note that "the information under 'Exceptional Characteristics: Primary' must correspond with where the student appeared/will appear on the 94-142 Child Count."

All of defendant's completed conference report forms have the characteristic "educationally handicapped" checked in the "primary" box. Only one of the forms has the characteristic "learning disabled" checked, and that is checked in the "secondary" box. The terms "educationally handicapped" and "learning disabled" are not defined on the forms, nor is the distinction between a "primary" and "secondary" characteristic explained. Thus, we would be left to speculate as to the extent, if any, of defendant's learning disability. More fundamentally, we would also be left to speculate as to the relationship between a learning disability and general mental impairment. Because of the absence of any conclusive psychological information on the forms, we fail to see how trial counsel's decision not to investigate or present these records substantially shows his ineffectiveness. Moreover, even if one accepts that defendant is learning disabled, defendant has failed to demonstrate how that fact creates a reasonable probability that the judge "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2069, 80 L. Ed. 2d at 698.

In addition, we note that there is information in the school records that is potentially aggravating to defendant. Defendant's teachers made written comments on many of the different reports. Some of these comments were

positive, noting, for example, that defendant got along well with others. However, most of the comments were critical, including such notes as: "does not seem to be concerned about his low level of achievement"; "talks out of turn"; "truant"; and "lazy." Trial counsel cannot be faulted for failing to present evidence which contained some mitigating evidence, but which also mentioned aggravating information, including defendant's lack of interest in education . . .

Defendant also contends that trial counsel was ineffective because he understated the available mitigating evidence. In support of this contention, defendant points to several affidavits from family members, teachers and friends which were part of his post-conviction petition. The affidavits show that these witnesses would have testified that defendant was nice, that he liked to help others, and that he had a highly troubled upbringing. Defendant contends that if trial counsel had presented these additional witnesses there is a reasonable probability that he would not have been sentenced to death. We disagree.

We have carefully read the affidavits and have concluded that the bulk of the proffered testimony was, in fact, presented at the sentencing hearing through the testimony of the mitigation witnesses. Through the testimony of Lincoln the trial judge was informed of defendant's need to be accepted and his desire to help others. Through the testimony of Dinguss, the trial judge heard extensive information regarding defendant's dysfunctional upbringing. Additional testimony offered on these points would have been cumulative. Trial counsel's performance cannot be considered deficient because of a failure to present cumulative evidence. . . .

Furthermore, some of the affiants' testimony was not helpful to defendant. James Marshall, a friend of the family, stated that he gave defendant a job at a car dealership. He noted that defendant "was very reliable," that "he worked hard" and that "he got along fine with the other workers." However, other evidence in the record establishes that defendant was employed by the car dealership for only one week. Given this information, we must conclude that Marshall's testimony would have received little weight, and, indeed, might have harmed defendant's credibility. Linda McGee, another friend of the family, stated in her affidavit that defendant would help her out by calling her boyfriend, who was married at the time to another woman. Clearly, aiding someone in this manner is not the type of evidence which trial counsel can be faulted for failing to present.

In short, defendant has failed to demonstrate that trial counsel was ineffective for failing to have additional witnesses testify on his behalf. Further, in view of the aggravating evidence put forth by the State, including the brutal nature of the crime and defendant's violent tendencies, defendant has failed to establish a reasonable probability that the trial judge would have imposed a different sentence had these witnesses testified.

See 171 Ill. 2d at 144-56, 662 N.E.2d at 1298-1303, 215 Ill. Dec. at 158-63.

3. Analysis

We note that the Illinois Supreme Court cited *Strickland* and applied the appropriate legal standard. As before, the question comes down to whether the application was reasonable.

Significantly, this case differs from *Brewer, Emerson,* and *Williams.* In those cases defense counsel did essentially nothing (or made matters worse).[15] Nor is this a case like *Hall,* in which the disregarded mitigating evidence included several selfless acts of heroism. Here, defense counsel, as conceded by Petitioner, followed the a reasonable mitigation strategy of emphasizing Petitioner's remorse and attempting to humanize him by presenting information about his troubled family life. The dispute centers on whether defense counsel did enough in pursuing the mitigation strategy.

We will not tarry long on the first prong of *Strickland.* Petitioner makes much of the fact defense counsel did not begin preparing for sentencing until after the trial. While the *Williams* Court indicated that a week was not adequate time to prepare for a death penalty hearing, defense counsel in this case had (presuming Petitioner's view is correct) well over a month to prepare. We are reluctant to conclude, as a matter of law, that a defense attorney can never adequately prepare for a sentencing hearing in a month.[16] Nonetheless, Petitioner has made at least a colorable showing that defense counsel made various errors, including the failure to interview and prepare witnesses. (*See* Lincoln and McLean Affidavits, Post-Conviction Record at pp. 288-89, 292.). *See generally*

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[15] Although the failure to present any mitigating evidence is not necessarily ineffective assistance. *See, e.g., Jones,* 76 F.3d at 846.

[16] Although it would not be unprecedented for a defense attorney to squander even an adequate time period. *See, e.g., Hall,* 106 F.3d at 746 ("Sixth weeks elapsed between the conviction and the sentencing hearing – six weeks in which Hall's lawyers did practically nothing to advance the case.")

Washington v. Smith, 219 F.3d 620 (7th Cir. 2000). Most of Petitioner's claimed errors, however, could only fairly assessed as "errors" after a hearing in which defense counsel had the opportunity to testify as to whether the claimed "errors" were actually reasonable strategic choices under the circumstances. No such hearing is necessary in this case, as Petitioner cannot show prejudice from any of the claimed errors.

First, as to defense counsel's failure to consult a psychiatrist, we note that a troubled family life and an abnormal psychological profile are not sure-fire winners as mitigating factors. The impact of evidence regarding mental/psychological shortcomings can be far from decisively positive for a defendant. *See Holman v. Gilmore,* 126 F.3d 876, 883-84 (7th Cir. 1997), *cert. denied,* 522 U.S. 1150, 140 L. Ed. 2d 179, 118 S. Ct. 1169 (1998). "Men who repeatedly assault women, finally murdering one, are unlikely to have a normal psychological profile," and "they are unlikely to be the highly intelligent products of a warm and loving home." *Thomas,* 144 F.3d at 517. Even the presentation of such "mitigating" characteristics as a below average IQ, neurotic personality, "antisocial personality disorder", and "characterological disorder of the asocial type" may be "exceedingly unlikely" to have prevented the imposition of a death sentence given the brutality of the crime. *Lear v. Cowan,* 220 F.3d 825, 829 (7th Cir. 2000) (such diagnoses "strikes us as fancy language for being a murderer"). In addition, it is not ineffective assistance, per se, not to seek a psychological review if there is no indication of mental illness. *See generally Tenner v. Gilmore,* 184 F.3d 608 at 615-16; *Jones,* 76 F.3d at 841 (The Sixth Amendment does not require the defense attorney to explore his client's mental capacity in every

case). *See also Lear v. Cowan,* 207 F.3d 886 at 888 (There is no per se entitlement under the Eighth Amendment to the services of a "mitigation specialist"). Moreover, a good portion of Dr. Hillman's report is merely cumulative to Ms. Dinguss's testimony about Petitioner's troubled family life. *See* Hillman Report, State Post-Conviction Record at 169-175.

As to Hillman's most significant conclusion, that the Petitioner was suffering from an "extreme mental and emotional disturbance" during the commission of the crime (State Post-Conviction Record at p. 175), it is not as helpful as it would appear to be. While that would be a statutory mitigating factor in Illinois, any attempt to establish that the Petitioner was suffering such an extreme emotional disturbance would be doomed to failure. Over the course of the attack, Petitioner made several coldly calculated decisions, which included: (1) the decision to kill the victim/witness to avoid prosecution for the gang rape (Confession, Supplemental Record on Direct Appeal at pp. 36-7); (2) the decision to help jump start a friend's car while contemplating victim's fate (*Id.* at 37); (3) the decision to jump start a friend's car with the victim in his trunk en route to the kill site (*Id.* at 39); (4) the decision to evade a group of accomplices to the rape that were following in a second car (*Id.*); (5) the decision to wait for police activity to cool en route to the kill site (*Id.* at 40); (6) the decision to make sure the victim was "finished off" (*Id.* at 41); and (7) the decision to overrule codefendant Croft as to who would administer the gruesome *coup de grace* with the car (*Id.* at 42). Given the duration of the attack, Petitioner's control of other participants, Petitioner's coldly rational decision to eliminate the victim/witness, and Petitioner's nonchalant actions in helping a friend

with car trouble while the victim was in Petitioner's trunk, any claim that Petitioner was out of control due to an "emotional disturbance" is completely untenable. There is no prejudice in failing to present a psychological expert on the issue of extreme emotional disturbance if the facts of the crime show such a defense could not be established. *See Foster v. Schomig,* 215 F.3d 687, 2000 U.S. App. LEXIS 11956, No 99-1398, slip op at *10 (7th Cir. May 31, 2000). *See also Ashford,* 167 F.3d at 1135 (counsel's failure to present evidence that defendant used drugs shortly before offense not prejudicial, given that the cold, calculated nature of offense provides no support for inference that defendant was impaired). That Petitioner's counsel did not present this futile defense does not show ineffective assistance.

The result regarding the other proposed evidence is the same. That defense counsel did not present every conceivable family/character witness does not automatically render his performance ineffective.[17] In *Strickland* itself the failure to present additional character witnesses was not deemed ineffective assistance, nor was the state court's failure to hold an evidentiary hearing on the issue deemed error. *See* 466 U.S. at 698-700. Character witnesses may be far from enough to change a sentencing decision. *See generally Milone v. Camp,* 22 F.3d 693, 704 (7th Cir. 1994), *cert. denied,* 513 U.S. 1076, 130 L. Ed. 2d 626, 115 S. Ct. 720 (1995) ("twenty-five people testifying to Milone's good character would not be likely to alter the

[17] Even though he chose not to call them to the stand, defense counsel did acknowledge that 15 friends and relatives were at the sentencing hearing offering their support to Petitioner.

sentence pronounced by a judge who had just found Milone guilty at a bench trial of a particularly heinous and gruesome murder").

An attorney may reasonably decide not to present character/family witnesses, if their testimony is unlikely to help (or may even harm) the defendant's case. *See, e.g., Burger v. Kemp,* 483 U.S. 776, 793-95, 97 L. Ed. 2d 638, 107 S. Ct. 3114 (1987). The family/friend witness affidavits seem to stress one or both of the following points: (1) that the Petitioner that they knew was a nice person; and/or (2) that Petitioner had a difficult family life. In light of the brutality of the crime, the former was unlikely to influence the sentencer. *See Milone.* As to the latter, it is cumulative to the testimony actually presented at the sentencing hearing. Further, some of the proposed witnesses could have been subject to embarrassing cross examination, including the Petitioner's mother (Petitioner's primary abuser), grandmother (who also figured negatively in his life), his "employer" (whose assessment looks foolish given the brief period of employment), and a friend (who Petitioner assisted in an adulterous relationship). *See generally Brewer,* 935 F.2d at 859 (failure to present defendant's employment record not ineffective assistance). Lastly, the neither the school records nor prison records contained information likely to make any real difference in the sentencer's decision. Judge Easterbrook could have been writing about this case when he wrote: "[Petitioner's] current lawyers assume that a good lawyer must be able to find some resource for every accused, no matter what the evidence shows. Not so. Some crimes are so heinous, and so well documented, that there is little to be done for the defendant." *Tenner,* 184 F.3d at 617.

In sum, there is nothing unreasonable in the Illinois Supreme Court's application of *Strickland* principles to this issue.

CONCLUSION

For the foregoing reasons, the court orders that a writ of habeas corpus will be granted unless the State of Illinois holds an appropriate new hearing on Petitioner's *Batson* claim within 120 days of the date of this order. If the *Batson* hearing is not held within that time limit, a writ of habeas corpus will be granted unless the Petitioner is retried within 240 days of the date of this order. This order will be automatically stayed during the pendency of any appeal.

ENTER:

John A. Nordberg

Senior United States District Judge

Dated: September 29, 2000

APPENDIX C

UNITED STATES OF AMERICA ex rel.
DEMETRIUS HENDERSON, Petitioner, v.
THOMAS PAGE, Warden, Menard Correctional
Center, Respondent.

No. 97 C 1079

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

1997 U.S. Dist. LEXIS 10208

July 10, 1997, Decided
July 11, 1997, date docketed

DISPOSITION: Petitioner's Motions to Depose Trial Counsel and for Funds for a Medical Expert DENIED.

COUNSEL: For DEMETRIUS HENDERSON, United States of America, ex. rel., petitioner: Alan Michael Freedman, Freedman & Bornstein, Chicago, IL. Carol R. Heise, H. Candace Gorman, Chicago, IL.

For THOMAS PAGE, Warden, Menard Correctional Center, respondent: Arleen C. Anderson, Illinois Attorney General's Office, Criminal Appeals Division, Chicago, IL. Renee Goldfarb, Cook County State's Attorney, Chicago, IL.

JUDGES: JOHN A. NORDBERG, United States District Judge

OPINION BY: JOHN A. NORDBERG

OPINION: MEMORANDUM OPINION AND ORDER

Petitioner Demetrius Henderson ("Henderson"), an Illinois prisoner currently under a sentence of death, has filed a seven count federal habeas corpus petition alleging

that constitutional error resulted in his conviction and sentence of death. Henderson claims, *inter alia,* that trial counsel was ineffective for failing to: (1) present corroborating evidence with his suppression motion; (2) investigate possible available mitigating and aggravating evidence prior to the innocence-guilt phase in order to ensure a cohesive strategy with the sentencing phase, which would have created a reasonable probability that the death sentence would not have been entered; (3) request the appointment of a psychologist to do a full psychological evaluation and to testify on petitioner's behalf, instead of relying upon an unqualified social worker; and (4) investigate and present substantial explanatory and humanizing mitigating evidence, including but not limited to evidence that at the time of the crime the petitioner was under the influence of an extreme mental or emotional disturbance. Presently before the Court are Petitioner's motions for discovery pursuant to Habeas Corpus Rule 6(a).

PROCEDURAL BACKGROUND

The Court reproduces the Illinois Supreme Court's background statement in pertinent part: The defendant's convictions stem from incidents which took place on the night of July 12, 1986 and which extended into the early morning hours of July 13, 1986. During the course of a party held that night and morning, defendant and several codefendants sexually assaulted Kimberly Boyd. After the assault, the defendant told his codefendants that they would have to kill the victim because he was "not going to spend no time in jail" for having raped her. The victim was subsequently blindfolded and placed in the trunk of defendant's car. Defendant, and one codefendant, then

proceeded to an alley in Chicago where they removed the victim from the trunk, stabbed her over 40 times, and ran over her with the car until they were certain she was dead. A police investigation initiated after the discovery of the body led to the eventual arrest of defendant and a lengthy statement in which defendant admitted to the crimes. *People v. Henderson,* 171 Ill.2d 124, 129-30, 215 Ill.Dec. 147, 662 N.E.2d 1287 (1996).

On August 6, 1986 Petitioner was indicted, along with several co-defendants, for the sexual assault, kidnaping, and murder of Kimberly Boyd. Prior to trial, Petitioner moved to quash his arrest, suppress his confession, and sever his trial. The Court denied the motions to quash and suppress and granted the motion to sever, resulting in a simultaneous bench-jury trial. On May 12, 1987 a jury convicted Petitioner of aggravated kidnaping, aggravated criminal sexual assault, and murder. Having accepted a waiver of a capital jury sentencing, the trial judge conducted a sentencing hearing, where he determined that defendant was 18 years old at the time of the murder, that he had killed the victim during the course of the felony, and, therefore, that he was eligible for the death penalty. After hearing evidence in aggravation and mitigation, the judge also determined that there were no mitigating factors sufficient to preclude the imposition of the death penalty, and sentenced defendant to death, along with 45 years on the aggravated criminal sexual assault conviction and 10 years on the aggravated kidnaping conviction.

A notice of appeal was filed on June 25, 1987, but because no post-sentencing motion had been filed in the trial court the Illinois Supreme Court remanded the cause for such proceedings. The trial court denied the post-sentencing motion, on direct appeal the Illinois Supreme

Court affirmed Henderson's conviction and sentence on November 30, 1990, but reduced the sentence for aggravated criminal sexual assault to 30 years, *People v. Henderson,* 142 Ill.2d 258, 154 Ill.Dec. 785, 568 N.E.2d 1234 (1990), and the United States Supreme Court subsequently denied certiorari, *Henderson v. Illinois,* 502 U.S. 882, 116 L.Ed.2d 189, 112 S.Ct. 233 (1991). On June 23, 1993, the Circuit Court of Cook County dismissed the post-conviction petition challenging the conviction and sentence of death, without conducting an evidentiary hearing. The Illinois Supreme Court affirmed the dismissal on January 25, 1996 and denied rehearing on April 1, 1996. *People v. Henderson,* 171 Ill.2d 124, 215 Ill.Dec. 147, 662 N.E.2d 1287 (1996).

ANALYSIS

The United States Supreme Court recently analyzed Habeas Corpus Rule 6(a), which provides:

> A party shall be entitled to invoke the process of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

Bracy v. Gramley, 117 S.Ct. 1793 (June 9, 1997). The Court explained that, as the first step in determining whether a habeas petitioner is entitled to discovery under Rule 6(a) to support his constitutional claim, a court must "identify the 'essential elements' of that claim." *Id.* at 1797 (quoting *United States v. Armstrong,* 134 L.Ed.2d 687, 116 S.Ct. 1480, 1488 (1996)). Once a court determines that, "if it

could be proved," the allegation constitutes a constitutional violation, the court must "turn to the question whether petitioner has shown 'good cause' for appropriate discovery to prove his [constitutional] claim." *Id.* The Supreme Court defined the inquiry as follows: "'where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the courts to provide the necessary facilities and procedures for an adequate inquiry.'" *Id.* at 1799 (quoting *Harris v. Nelson,* 394 U.S. 286, 299, 22 L.Ed.2d 281, 89 S.Ct. 1082 (1969)) (alteration in original).

Petitioner's ineffective assistance of counsel claims are centered on the conduct of trial counsel at the hearing held on his motion to suppress his confession and the conduct of trial counsel in relation to the sentencing hearing. *Henderson,* 171 Ill.2d at 140. As in his post-conviction proceedings, Petitioner now seeks discovery. Henderson seeks appointment of an otolaryngologist (specialist in hearing disorders) to examine defendant and leave to depose trial counsel in order to probe his decision-making process.

Pursuant to *Bracy,* this Court must first identify the essential elements of Petitioner's Sixth Amendment ineffective assistance of counsel claims. The Supreme Court set out the elements of a claim for actual ineffective assistance of counsel in *Strickland v. Washington,* 466 U.S. 668, 687, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel'

> guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

The Court elaborated on these requirements, stating that in order to satisfy the first prong "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. The Court further "required that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. Finally, "the defendant must overcome the [strong] presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Id.*

As to the second prong, prejudice, the Court further explained that "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. A presumption likewise attaches to the second prong, namely, "that the judge or jury acted according to law." *Id.* Thus:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder

> would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Id. at 695.

This Court has not yet fully identified the essential elements of Petitioner's ineffective assistance of counsel claims, however. Rather, because the claim is presented in the context of a petition for a writ of habeas corpus, additional elements attach to Petitioner's claims. Under the federal habeas statute, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("Act"), in order to obtain relief Petitioner must show that:

> the adjudication of the [ineffective assistance of counsel claim by the Illinois Supreme Court] –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (Supp.1997).

The Act further provides that:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody

> pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
>
> § 2254(e)(1).

Finally, the Supreme Court held in *Strickland* that "a state court conclusion that counsel rendered effective assistance of counsel is not a finding of fact binding on the federal court to the extent stated by [former] 28 U.S.C. § 2254(d) [, now § 2254(e)(1)]." 466 U.S. at 698. Rather, "although state court findings of fact made in the course of deciding an ineffectiveness claim are subject to the deference requirement of § 2254 [(e)(1)], . . . both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Id.* It follows, then, that new § 2254(d)(1) applies to the Illinois Supreme Court's conclusion that Petitioner's trial counsel rendered effective assistance of counsel.

In sum, the essential elements of Petitioner's ineffective assistance of counsel claims are: (1) counsel's performance was deficient; (2) a reasonable probability that, but for this deficiency, the result of the proceeding would have been different; and (3) the Illinois Supreme Court's conclusion that counsel rendered effective assistance was (a) based on an unreasonable determination of the facts in light of the evidence presented at the State court proceeding, as shown by clear and convincing evidence, or (b) was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

A. Motion to Depose Trial Counsel

In support of his Motion to Depose Trial Counsel, Petitioner relies only upon the above described strong presumption that counsel's actions were the result of sound trial strategy. Thus, argues Petitioner, in order to rebut this presumption he must probe counsel's decision-making process in a deposition. However, as the Supreme Court noted:

> there is no reason for a court deciding an ineffective assistance claim . . . even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.

Id. at 697.

In other words, whether trial counsel's actions were the result of sound trial strategy is moot if Petitioner cannot demonstrate a reasonable probability that, but for these actions, the result of the proceedings would have been different. In light of Petitioner's failure to address whether (1) prejudice resulted from the alleged deficiencies and (2) the Illinois Supreme Court's conclusion that it did not was contrary to, or involved an unreasonable application of, clearly established Federal law, this Court cannot conclude that, if counsel's trial strategy is fully developed through deposition, Petitioner may be able to

demonstrate that he is entitled to relief. *Bracy,* 1997 WL 303400, at *5. Accordingly, the Court denies the Motion to Depose Trial Counsel.

B. Motion for Funds for a Medical Expert

Petitioner seeks an otolaryngologist to examine him and his medical records in order to support his claim of ineffective assistance of counsel at the suppression hearing for failure to obtain evidence corroborating that given by Petitioner, namely, that the Chicago police coerced his confession by beating him. In support of his Motion, Petitioner submits medical records dated August 19, 1986 which tend to corroborate his suppression hearing testimony, but were not submitted by trial counsel. As Petitioner emphasizes, in concluding that Petitioner failed to demonstrate ineffective assistance of counsel at the suppression hearing, the Illinois Supreme Court incorrectly found that the medical record submitted was merely dated 1986, when in fact it is clearly dated "08 19 86." (App. A). Further, the Illinois Supreme Court partially relied upon this finding in concluding that Petitioner failed to demonstrate prejudice, stating that the medical record is "ambiguous in [its] support for defendant's position," because while it "notes defendant's complaint that the police struck him, the record is dated only '1986.' . . . [I]t is possible to interpret these records as supporting the argument that defendant's first complaint of police mistreatment was not made until several months after the interrogation took place in July 1986, an interpretation which weighs against defendant's allegations of police misconduct." *Henderson,* 171 Ill.2d at 143.

Although Petitioner has thus addressed[1] the essential element of demonstrating that the Illinois Supreme Court's conclusion was based on an unreasonable determination of the facts, Petitioner fails to address whether there is a reasonable probability that, absent the alleged error, (a) the confession would have been suppressed and (b) the factfinder would have had a reasonable doubt respecting guilt. Regardless, the Court denies appointment of a medical expert for the alternative reason that, even assuming examination will show to a reasonable degree of medical certainty that Petitioner sustained an ear injury attributable to trauma such as a beating about the head, the examination surely cannot demonstrate to a reasonable degree of medical certainty that the injury was inflicted by the Chicago police at the July 1986 interrogation instead of by a fellow inmate between the interrogation and August 19, 1986 – the alternative explanation.

CONCLUSION

For the reasons given, the Court DENIES Petitioner's Motions to Depose Trial Counsel and for Funds for a Medical Expert.

ENTER:

JOHN A. NORDBERG

United States District Judge

DATED: July 10, 1997

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[1] The Court does not purport to determine whether Petitioner has *demonstrated* this element.

APPENDIX D

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. DEMETRIUS HENDERSON, Appellant

No. 65457

Supreme Court of Illinois

142 Ill. 2d 258; 568 N.E.2d 1234; 1990 Ill. LEXIS 138; 154 Ill. Dec. 785

November 30, 1990, Filed

SUBSEQUENT HISTORY:

Rehearing Denied April 1, 1991.

PRIOR HISTORY:

Appeal from the Circuit Court of Cook County, the Hon. Richard E. Neville, Judge, presiding.

DISPOSITION: Judgment Affirmed, As Modified.

COUNSEL: Charles M. Schiedel, Deputy Defender, of Springfield, and Charles W. Hoffman, Assistant Defender, of Chicago, both of the Office of the State Appellate Defender, for appellant.

Neil F. Hartigan, Attorney General, of Springfield, and Cecil A. Partee, State's Attorney, of Chicago (Terence M. Madsen, Assistant Attorney General, of Chicago, and Inge Fryklund, Renee Goldfarb, Kevin Sweeney and David R. Butzen, Assistant State's Attorneys, of counsel), for the People.

JUDGES: Justice Stamos delivered the opinion of the court. Justice Clark, dissenting. Justice Calvo joins in this dissent.

OPINION BY: STAMOS

OPINION: JUSTICE STAMOS delivered the opinion of the court:

Defendant, Demetrius Henderson, was convicted of the murder of Kim Boyd (Ill. Rev. Stat. 1985, ch. 38, par. 9-1(a)) following a jury trial in the circuit court of Cook County. On the State's motion, a death penalty hearing was held before the trial judge, defendant having waived his right to a jury at the death penalty hearing. The trial judge found defendant eligible for the death penalty, for he was 18 years old at the time of the murder and had committed the murder during the course of another felony. (Ill. Rev. Stat. 1985, ch. 38, par. 9-1(b)(6).) The trial judge also found that no mitigating factors existed sufficient to preclude imposition of the death sentence (Ill. Rev. Stat. 1985, ch. 38, par. 9-1(h)), and so sentenced defendant to death. In addition to the murder conviction, defendant was convicted of aggravated criminal sexual assault (Ill. Rev. Stat. 1985, ch. 38, par. 12-14(a)), for which he was sentenced to 45 years' imprisonment, and aggravated kidnapping (Ill. Rev. Stat. 1985, ch. 38, par. 10-2(a)), for which he was sentenced to 10 years' imprisonment. Defendant's post-trial motions were denied. Execution was stayed pending direct review by this court. (Ill. Const. 1970, art. VI, § 4(b); Ill. Rev. Stat. 1985, ch. 38, par. 9-1(i); 107 Ill. 2d Rules 603, 609(a).) We affirm.

FACTS

The sexual assault, kidnapping, and murder of 16-year-old Kim Boyd took place during the early morning hours of July 13, 1986. On the night of July 12-13, there was a party at the house of codefendant Curtis Croft

attended by defendant, Boyd, codefendants Croft, Kevin Campbell, and Alonzo Woodard, and others, including Anthony Woodard, who testified for the prosecution. There were various comings and goings during that night until around 3 a.m., when Boyd was alone in the house with defendant, Croft, Campbell, and Alonzo and Anthony Woodard. What happened next was revealed by the testimony of Anthony Woodard, by defendant's signed statement given to Assistant State's Attorney Bernard Murray and Chicago police detective Lee Almanza on July 18, 1986, and by the testimony of Dr. Mitre Kalekar, the deputy medical examiner who performed the autopsy on Boyd.

According to defendant's statement, he called Boyd and Anthony into a separate room and angrily asked Boyd why she was having sexual relations with both Anthony and Alonzo Woodard. Boyd made a "smart remark," so defendant picked up a roll of wallpaper and hit her in the head. Defendant then called Croft, Campbell, and Alonzo Woodard into the room, and defendant and those three forced Boyd to engage in a variety of sexual acts. After they were finished, defendant talked to Croft and Campbell about what to do with Boyd. Defendant said they could not just let Boyd go, even though she said she would not say anything, because if he were a girl he would tell what had happened. Instead, defendant said they would have to kill her because he was "not going to spend no time in jail for a bitch." Defendant then went outside to give a friend's car a jump. As he returned to the house, he saw Croft and Campbell indicating he should keep quiet and drive his car to the back of the house. When defendant did so, he saw Boyd standing blindfolded; Croft, Campbell, and Anthony and Alonzo Woodard were present. After

Anthony began walking back toward the front of the house, Croft and Campbell put Boyd in the trunk of defendant's car. Campbell said that he, Anthony, and Alonzo would follow, in a second car, defendant's car containing defendant, Croft, and Boyd. Before driving away, defendant stopped and gave another jump to his friend's car. Defendant then intentionally evaded the following car, explaining that he did so because he did not want the others to be present when Curtis and he killed Boyd.

Anthony Woodard's testimony on behalf of the prosecution varied from defendant's statement primarily by denying that his brother Alonzo and Campbell voluntarily participated in the assault. Anthony testified that defendant and Boyd went into a separate room, that defendant then called him into the room, and that he and Croft joined defendant and Boyd. Defendant ordered Boyd to take off her pants, and when she began fighting back defendant hit her twice in the jaw. While Anthony sat in a chair, defendant and Croft forced Boyd to have sexual intercourse. Anthony told defendant and Croft to stop but did not try to physically stop them because Croft had a knife with a six-inch blade. Anthony could hear his brother Alonzo and Campbell trying to get into the room, but a chair in front of the door prevented them from entering. Later, defendant opened the door and told Alonzo and Campbell to have sex with Boyd; they did so while Croft held a knife on them. Anthony also said that defendant had a knife in his pocket. Defendant then took Boyd into the bathroom, and when they came out Boyd had cleanser on her face. Defendant and Croft tried to confuse Boyd by telling her she was somewhere else. Defendant then said they would have to kill Boyd. While Croft blindfolded Boyd

and took her behind the house, defendant went to get his car. Anthony, Alonzo, and Campbell went to the front of the house where they had parked their car, and Anthony saw defendant giving a car a jump. Defendant then drove his car to the back of the house and in a few minutes drove back to the front of the house with Croft in the car. When Campbell asked where Boyd was, Croft patted the trunk of the car. Alonzo offered to take Boyd home, but Croft said he and defendant would do that and tried to ignore the other three. Alonzo, Anthony, and Campbell tried to follow defendant's car in their own car. When they reached the street where defendant should have turned to take Boyd home, Alonzo, who was driving, blew his horn. But defendant continued on and Alonzo soon lost him in traffic.

Through cross-examination, defendant's attorney tried to discredit Anthony's credibility. Anthony testified that he would try to help out his brother and Campbell, who was like a cousin to him, but that he was not related to defendant or Croft. Anthony admitted that he had not tried to physically stop the assault, but had merely asked defendant and Croft to stop. Nor did he try to escape from the room and get help, even though at certain times, when Croft was with Boyd, he only would have had to get by defendant, whose knife was in his back pocket and who was smaller, although older, than Anthony. Furthermore, Anthony never approached the police to tell them what had happened, waiting until they came to him.

We have only defendant's statement, and the forensic evidence, to tell us what happened after defendant eluded the other car. Both defendant and Croft expressed some hesitancy about killing Boyd, but in the end decided that they had to do it. Defendant stopped the car in an alley behind the 6000 block of South Carpenter Street in

Chicago, and opened the car's trunk, and he and Croft took Boyd out. She told defendant she could "explain," but defendant grabbed a switchblade knife Croft was holding and stabbed her twice in the throat. Croft then took the knife and stabbed Boyd, then defendant did so, and they alternated in this way until Boyd had approximately 40 stab wounds in her head, neck, chest, hands, back, and buttocks. Believing she was not yet dead, defendant and Croft got into the car and defendant drove over her three times. They got out of the car, confirmed that she was finally dead, and drove away. Dr. Kalekar testified concerning the multiple stab wounds, bruises, broken bones, and other wounds to the body consistent with being run over and dragged by a car.

Boyd's body was found later that morning and a police investigation was begun, leading to the arrest of defendant and Curtis Croft on July 17, 1986, at defendant's home. At the Area 3 Violent Crimes police station during the night of July 17-18, Assistant State's Attorney Murray and various detectives questioned defendant, Croft, Campbell, Anthony and Alonzo Woodard, and two girls who had attended the party the night of July 12-13. Initially, defendant denied involvement in the murder, although he admitted being at the party. When Assistant State's Attorney Murray told defendant this was inconsistent with what other witnesses had said, defendant asked what Croft had said. Croft was brought into the room and recounted the statement he had made to the police earlier. Defendant then made both an oral and a court-reported statement.

Defendant's jury trial was severed from the bench trials of his codefendants; however, all four trials were conducted simultaneously. Additional facts concerning the

night of July 12-13, the course of the police investigation, and the conduct of the trial will be related as necessary.

ANALYSIS

Defendant presents numerous arguments for our consideration and requests that we grant him a new trial, or, in the alternative, that we vacate his death sentence and remand for a new death penalty hearing or imposition of a sentence other than death. Defendant's arguments concern the selection of the jury, the admission and exclusion of evidence at trial, the conduct of the sentencing hearing, the propriety of his sentences of death and imprisonment, and other matters.

Jury Selection

Defendant first challenges his convictions on the basis that, in selecting the jury which convicted him, the prosecution purposefully discriminated against black venire members when exercising peremptory challenges, and thus violated the equal protection clause of the fourteenth amendment (U.S. Const., amend. XIV), as construed in *Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712. The Supreme Court in *Batson* held that the prosecution denies a defendant his rights under the equal protection clause if the prosecution exercises peremptory challenges so as to purposefully exclude members of a defendant's race from the jury. In order to establish a *Batson* claim, a defendant has to first establish a *prima facie* case by showing that he is a member of a cognizable racial group and that the prosecution exercised peremptory challenges to exclude from the jury venire members who share his race, and by pointing to any other relevant

circumstances that raise an inference of purposeful discrimination by the prosecution. (*See People v. Hope* (1990), 137 Ill. 2d 430, 452-56 (discussing the process used in adjudicating a *Batson* claim).) In this case, the issue is whether the trial court erred in ruling that defendant had not established a *prima facie* case.

After a jury of 12 and 2 alternate jurors had been sworn, but before opening statements had been made, defense counsel moved for a mistrial on the basis that the prosecution had systematically excluded black venire members from the jury through the exercise of peremptory challenges. Defense counsel noted that of the nine venire members peremptorily challenged by the prosecution, six were black (appellate defense counsel acknowledges that the prosecution actually used ten, not nine, peremptory challenges). Defense counsel further noted that the jury chosen consisted of four white males, six white females (two of whom were apparently Hispanic), and two black females. The two alternate jurors were a black male and a white female. To buttress his motion, defense counsel also referred to the prosecution's exercise of peremptory challenges during the aborted *voir dire* of the first venire called in this case: Of the three peremptory challenges exercised by the prosecution during *voir dire* of this first venire, two were exercised against blacks. (*Voir dire* of the first venire proceeded only as far as the selection of a panel of four jurors, at which time the entire venire and the four jurors chosen from it were dismissed by the trial judge because the judge, without objection from counsel, excused one of the four chosen jurors, the only black on that panel, after finding that the juror would not be able to fully concentrate on the case, and because the defense refused to accept the broken panel of jurors.) In framing

his *Batson* claim on appeal, defendant has also included those three peremptory challenges exercised by the prosecution during *voir dire* of the first venire. The trial court reserved ruling on defendant's motion for a mistrial until the morning of the next day.

At that time one juror, apparently one of the two Hispanic females, who had told the trial judge that she would be unable to concentrate on the trial owing to serious personal problems, was brought into chambers to repeat her concerns in the presence of the lawyers. The judge excused this juror without objection. The first alternate, a black male, then became a juror.

The judge then denied defendant's motion for a mistrial, finding that the prosecution had not systematically excluded blacks from the jury and therefore would not have to explain the reasons for its challenges, and thereby implicitly finding that defendant had not made a *prima facie* case of purposeful discrimination as required by *Batson*. In announcing its ruling, the court documented the jury selection procedure that had been used, the racial makeup of the jury, and the peremptory challenges used by the prosecution.

Because the record is unclear as to certain facts, in evaluating defendant's claim of purposeful discrimination, we have had to make our own review of the record to determine the number of challenges exercised by the parties and the races of those challenged by the prosecution. We have found the following pertinent facts, construing any ambiguity in the record against defendant, who had the burden of preserving the record (*see, e.g., People v. Brown* (1987), 152 Ill.App.3d 996, 1002).

The jury selection procedure used was to seat panels of venire members (three panels were seated, numbering 14, 14, and 12), have the trial judge inquire of them initially, and then allow inquiry first by the defense and then by the prosecution as to the first panel, and first by the prosecution and then by the defense as to the second and third panels. Following the questioning of each panel, the defense and the prosecution gave the trial judge a list of those venire members whom they challenged, without revealing these challenges to the opposition. This procedure was used on the recommendation of defense counsel.

Of the 40 venire members examined, 3 were excused for cause. Prosecution and defense were each allotted 14 peremptory challenges; the prosecution used 10, while the defense used 13. Of the 10 peremptory challenges exercised by the prosecution, 6 were exercised against blacks. Of the 27 venire members accepted by the prosecution, 5 were black. After the defense exercised its challenges, 3 of the 14 venire members chosen to serve as jurors or alternates, and 3 of the 12 jurors who convicted defendant (the black alternate became a juror after the first day of testimony), were black. The relevant racial statistics are thus: 30% of the pool of 37 venire members not challenged for cause was black, compared to black representation of 19% among the 27 venire members accepted by the prosecution; also, 60% of the State's 10 peremptory challenges were exercised against the black 30% of the venire, and 21% of the 14-member jury was black.

In determining whether the trial judge correctly ruled that defendant failed to establish a *prima facie* case of purposeful discrimination, we constrain our inquiry in certain ways: We consider the *voir dire* of the second venire only; we disregard any racial distinction between

Hispanic and white venire members; and we consider the jury as a group of 14 which includes the 2 alternates selected, not as a jury of 12.

Contrary to defendant's urgings, we decline to consider the prosecution's peremptory challenges to members of the first venire, before that venire was dismissed. As stated, a panel of four jurors was initially selected from the first venire, and in selecting this panel the prosecution exercised three peremptory challenges two of which were against blacks. We decline to consider these challenges because we recognize that attorneys approach the selection of a jury as one entire process, during which an attorney individually assesses each venire member's character, views, and impartiality, and then decides which venire members to challenge and which to accept while reserving a sufficient number of challenges for use against those venire members who have not yet been questioned. Given the complex strategic nature of the jury selection process and the exercise of peremptory challenges, we find that the facts involved in the selection of a single panel of four jurors are not probative of whether the prosecution purposefully discriminated in the selection of a full jury. For the same reason, we reject the State's approach of analyzing the racial balance of the prosecution's challenges by separately analyzing its challenges to each of the three panels of venire members seated from the second venire, as well as its challenges as a whole.

We disregard the racial distinction between Hispanic and white venire members accepted by the prosecution, a distinction which the trial judge apparently relied on in part, for he mentioned the presence of two Hispanics on the jury, making a total of "five minority people." Because defendant is black, the only relevant racial distinctions

among venire members in this case are black and non-black. In establishing a *prima facie* case of prosecutorial discrimination against venire members of a defendant's race, a defendant can only rely on the prosecution's exercise of "peremptory challenges to remove from the venire members of the defendant's race" (*Batson,* 476 U.S. at 96, 90 L. Ed. 2d at 87, 106 S. Ct. at 1723; *see People v. Holman* (1989), 132 Ill. 2d 128, 171 (trial court correctly refused to consider prosecution's challenges to one Hispanic and one Filipino venire member, for defendant was black)). By the same token, we find that, in determining whether a *prima facie* case is established, it is irrelevant whether the prosecution accepted some venire members who belonged to a racial minority other than that of defendant.

Because of the method of jury selection used in this case, we include in our review not only the 12 original jurors, but also the 2 alternate jurors. The jury was selected from three panels of venire members, numbering 14, 14, and 12. By the time the third panel was called, 10 jurors had been selected. Thus, when the final panel of 12 was questioned, 2 jurors and 2 alternates were needed. Once again, the prosecution and the defense simultaneously submitted to the trial judge their challenges. The result was that 8 of these 12 venire members were challenged and 4, the exact number of jurors needed, were accepted. Of the four accepted, the first two who had been called became jurors, while the other two became the first and second alternates. Given this procedure of selecting the alternates from the same venire panel as the jurors, not from a separate panel, and given the fact that it was impossible for the prosecution to know, at the time it exercised its challenges, that the black male venire member whom it accepted would not initially be seated as

a juror, we find the races of the two alternate jurors to be relevant in deciding defendant's claim. (The black male, Juror M, was the fifth venire member called; the defense had three peremptory challenges remaining and the prosecution had eight; if the prosecution had wanted to minimize the likelihood of Juror M's becoming a juror, as opposed to an alternate juror, yet had been hesitant to strike him, it would not have challenged any of the four venire members who preceded Juror M, hoping the defense would not use all three of its challenges against three of the first four venire members; but in fact the prosecution challenged the third venire member, a white female.)

With this understanding of the factual boundaries of our review, we consider the arguments of the parties. The first decision we must make is whether defendant is able to present a *Batson* claim to us, for the State asserts that this claim was waived because defendant's objection to the prosecution's use of peremptory challenges was untimely. The State is correct; defendant waived his *Batson* claim by voicing his objection and moving for a mistrial in an untimely manner, not doing so until after the jury had been sworn. (*People v. Andrews* (1989), 132 Ill. 2d 451, 457; *People v. Harris* (1989), 129 Ill. 2d 123, 170-71.) Nonetheless, we consider defendant's *Batson* claim because, for its part, the State's right to raise defendant's waiver was itself waived when the prosecution neglected to argue the untimeliness of defendant's motion at the time the motion was made, and instead attacked the motion's merits. *Andrews,* 132 Ill. 2d at 458; *see also Harris,* 129 Ill. 2d at 171 (prosecution waived argument that defendant's claim of prosecutorial discrimination against black venire members was waived when untimely

made because it did not raise waiver argument until after *Batson* hearing had been held).

On the merits of his claim, defendant contends that the numerical racial imbalance of the prosecution's peremptory challenges, 6 of 10 being exercised against blacks, alone raises an inference of purposeful discrimination and establishes a *prima facie* case. Defendant cites cases in which the appellate court found a *prima facie* case established by similar numbers. (*See, e.g., People v. Seals* (1987), 153 Ill.App.3d 417 (*prima facie* case established where prosecution used 6 of 10 challenges against blacks without any apparent nonracial reason).) Besides the black-nonblack ratio of prosecution challenges, defendant argues that the following facts create an inference of purposeful discrimination: The prosecution struck all six blacks without asking them any questions probative of their backgrounds or impartiality, striking two of the six without asking them any questions, and striking the other four after asking such general questions as whether they could give the State a fair trial; the challenged blacks were heterogeneous in all respects except race; the only respect in which the challenged blacks could be distinguished from the white jurors was by race; and defendants in Cook County frequently claim that the prosecution systematically excluded blacks from their juries. Defendant discounts the relevancy of the fact that three blacks served on his jury, arguing that the issue is whether the prosecution discriminated against any of the six blacks it struck, not whether it failed to discriminate against the three black jurors.

Responding to defendant's arguments, the State reminds us that a *prima facie* case of purposeful discrimination cannot be established merely by the

number of blacks stricken by the prosecution (*see, e.g., People v. Hooper* (1989), 133 Ill. 2d 469, 505), and mentions other factors which this court has found relevant in ruling on a *Batson* claim. Also, the State makes the odd assertion that when each panel of venire members is examined individually it becomes apparent that "the prosecution exercised practically the same number of peremptory challenges to remove whites as blacks"; we have already rejected the method of analyzing *Batson* claims by fragmenting the jury selection process. Next, the State points out that the prosecution accepted at least one black from each panel and argues that this shows the prosecution did not exclude as many blacks as it could have done, a relevant factor (*see, e.g., United States v. Montgomery* (8th Cir. 1987), 819 F.2d 847, 851). In addition, the State believes that any inference of discrimination is undercut by the fact that 25% of the jurors, 3 of 12, were black, about the same as the percentage of the Cook County population 18 years old and older.

The State also contends that more than race distinguishes the stricken black venire members from white venire members accepted by the prosecution. Whereas many of the accepted white venire members were crime victims, one had a friend who had been raped, one had been a parole officer, one was training to be a policeman, and others knew lawyers and police officers, five of the six stricken black venire members did not share these characteristics. The State also claims that several of the stricken blacks had characteristics which the prosecution may have considered to be unfavorable; we find the factual support for this latter claim to be extremely weak. Additionally, the State claims the stricken blacks were similar in respects

other than race, yet supports this claim merely by stating that most of them (in reality only three of six) lived alone and were single. The State also notes that the record does not evidence the age of each venire member, a possibly legitimate distinguishing factor. The State denies that the number of times defendants in Cook County have claimed prosecutorial discrimination during jury selection is relevant; while the number of such claims proved might be relevant, defendant did not provide that information. On the other hand, one relevant fact in this case is that the victim and most of the witnesses are black, as is defendant, tending to negate a discriminatory motive by the prosecution. (*See People v. Evans* (1988), 125 Ill. 2d 50, 66 (racial characteristics of crime are relevant when ruling on establishment of *prima facie* case).) As a final point, the State mentions this court's previous holding that a trial court's finding that a defendant has not established a *prima facie Batson* claim will be overturned only if against the manifest weight of the evidence (*People v. Brisbon* (1989), 129 Ill. 2d 200, 231), and the Supreme Court's comment in *Batson* that a reviewing court should give "great deference" to a trial court's finding on intentional discrimination because it largely depends on an assessment of credibility (*Batson,* 476 U.S. at 98 n. 21, 90 L. Ed. 2d at 89 n. 21, 106 S. Ct. at 1724 n. 21).

Defendant responds to these arguments by asserting that, though the State claims that one possible reason for the prosecution's striking five of the six excluded black venire members is that they lacked characteristics the prosecution might have seen as favorable, some of the accepted nonblack jurors likewise lacked these characteristics (significantly, defendant limits his argument only to

nonblack jurors, excluding from his analysis those nonblack venire members accepted by the prosecution but stricken by defendant); the State fails to provide credible facts to support its argument that any stricken black venire members had characteristics unfavorable to the prosecution; and the characteristics of being single and living alone, cited by the State as a nonracial difference between the stricken blacks and the accepted nonblacks, not only were not possessed by three of the stricken blacks, but in fact were possessed by two white jurors. Defendant disputes that the fact that defendant, the victim, and many witnesses were black militates against the prosecution's possessing a discriminatory motive. For one thing, discrimination is illogical – if the prosecution was "'of a mind to discriminate'" (*Batson,* 476 U.S. at 96, 90 L. Ed. 2d at 87, 106 S. Ct. at 1723, quoting *Avery v. Georgia* (1953), 345 U.S. 559, 562, 97 L.Ed. 1244, 1248, 73 S. Ct. 891, 892), it may have concluded that black jurors would be less likely to convict a black defendant even if the murder victim was also black. Furthermore, defendant thinks the two most crucial prosecution witnesses were a white policeman and a white assistant State's Attorney, both of whom testified to defendant's questioning on the night of July 17, 1986, when he confessed. Defendant also denies that the trial court's finding of no *prima facie* case should be given any deference by us, for the quotation the State took from *Batson* regarding the deference to be given to a trial court's ruling referred to a trial judge's analysis of neutral explanations offered by the prosecutor, at which time a trial judge assesses the prosecutor's credibility (*Batson,* 476 U.S. at 98 n. 21, 90 L. Ed. 2d at 89 n. 21, 106 S. Ct. at 1724 n. 21).

The standard of review we apply, in determining whether the trial judge erred in ruling that defendant had failed to establish a *prima facie* case of purposeful prosecutorial discrimination against black venire members, is whether this ruling is against the manifest weight of the evidence. (*Brisbon,* 129 Ill. 2d at 231; *People v. Mahaffey* (1989), 128 Ill. 2d 388, 413.) In making this determination, because defendant has first shown he is a member of a cognizable racial group and members of the same racial group were peremptorily challenged by the prosecution (*Batson,* 476 U.S. at 96, 90 L. Ed. 2d at 87, 106 S. Ct. at 1723 (first element of a *prima facie* case)), we will consider all facts which reasonably indicate or refute purposeful discrimination by the prosecution, not just the number of challenges exercised against black venire members (*see Hooper,* 133 Ill. 2d at 505; *People v. Holman* (1989), 132 Ill. 2d 128, 172). Other factors from which an inference of discrimination can be drawn are: a disproportionate number of strikes against blacks, especially when so disproportionate as to present a "pattern" (*see, e.g., Hope,* 137 Ill. 2d at 462-63; *Mahaffey,* 128 Ill. 2d at 413); the level of black representation on the jury as compared to the venire (*Hooper,* 133 Ill. 2d at 503; *Mahaffey,* 128 Ill. 2d at 413); whether the stricken black venire members are heterogeneous in every respect except race (*e.g., Hooper,* 133 Ill. 2d at 503; *Mahaffey,* 128 Ill. 2d at 413); the prosecutor's questions during *voir dire* and statements when exercising challenges (*Hooper,* 133 Ill. 2d at 503; *Holman,* 132 Ill. 2d at 172-73); and the race of the defendant, victim, and witnesses (*e.g., Hope,* 137 Ill. 2d at 453; *Holman,* 132 Ill. 2d at 172-73).

Viewing all the relevant facts of this case, we cannot say that the trial court's finding that defendant failed to

establish a *prima facie* case is against the manifest weight of the evidence. The only factor strongly suggesting purposeful discrimination is the disproportionality of the prosecution's challenges to black as opposed to nonblack venire members; 6 of the prosecution's 10 peremptory challenges, or 60%, were used against blacks, who constituted only 30% of the venire members not excused for cause. Yet this disproportionality is not so severe that it creates a "pattern." All other relevant factors tend to refute the idea of discrimination, weigh neutrally in the balance, or mildly tend to suggest discrimination.

A factor that tends to refute an inference of discrimination, or whose value is, at most, neutral, is that this black defendant was found guilty of raping and murdering a young black woman. Despite defendant's view that the illogical nature of discrimination makes a crime's racial character irrelevant, we have to employ logic in our analysis; thus, we find that, when deducing the existence of a *prima facie* case of purposeful discrimination, whether or not the defendant and the defendant's victim are members of the same cognizable racial group is a relevant factor (*see, e.g., Hope,* 137 Ill. 2d at 453). In a case where the defendant is black and the victim is white, we recognize, at the *prima facie* stage of establishing a *Batson* claim, that there is a real possibility that the prosecution, in its efforts to procure a conviction, will use its challenges to secure as many white jurors as possible in order to enlist any racial fears or hatred those white jurors might possess. On the other hand, in a case where both the defendant and victim are black, their racial characteristics do not warrant an inference, at the *prima facie* stage, that the prosecution discriminated against venire members who were black. Furthermore, we refuse to conclude that

the fact that the defendant is black supports an inference of prosecutorial discrimination regardless of the victim's race.

Nor do we infer a discriminatory motive by the prosecution from the fact that the assistant State's Attorney who elicited defendant's confession and the police officer who testified to the course of the murder investigation were white. In fact, we believe the "star" prosecution witness was Anthony Woodard, the black youth who provided the only evidence, other than defendant's confession, that defendant sexually assaulted Boyd and drove off with her in the trunk of his car in the early morning hours of July 13, 1986.

In this case, the heterogeneity of the stricken black venire members is a neutral factor. Our review of the record shows that five of the six were nondiverse in respects other than race. Five of the six were single and had a college education; three of these five lived alone and the other two lived with immediate family. The sixth stricken black venire member was separated from her husband, had three daughters ranging in age from 22 to 30, apparently lived alone, and was unemployed, as were two of her three daughters. While these six venire members did not share identical backgrounds, and while it is true that the prosecution accepted white venire members who were single and lived alone, at this stage of a *Batson* claim we are only concerned with whether the stricken black venire members shared any characteristics other than race; it is not our role to search for possible reasons for the prosecution's strikes or for similarities between stricken black and accepted white venire members.

Another neutral factor here is the number and nature of the questions the prosecutor asked stricken black venire members and the statements the prosecutor made when exercising challenges. True, the prosecutor failed to ask any probative questions about the stricken black venire members' backgrounds or personalities; but, the fact is, the prosecutor failed to ask such probative questions of any venire members, black, white, or Hispanic. With one exception, the prosecutor limited his questions to general "fair trial" kinds of questions; the one exception was the prosecutor's asking a female black venire member, whom the prosecution accepted and who became a juror, about an attack on her husband and his crippling on-the-job injury. When exercising its challenges, the prosecution made no statements.

The final relevant factor is the level of black representation on the jury as compared to the venire, and here there is some support for an inference of discrimination. Of the 37 people not excused for cause, 11 were black, or 30%; of the 14-member jury there were 3 blacks, or 21%; and of the 27 venire members accepted by the prosecution, 5 were black, or 19%. Thus, there was a slight disparity between the level of black representation on the venire, 30%, and that on the jury, 21%.

In sum, considering all the relevant factors, only two factors (the percentage of blacks on the venire not excused for cause compared to the percentage of the prosecution's peremptory challenges exercised against and as compared to the percentage of blacks on the jury) tend slightly to suggest purposeful discrimination, while the others are either neutral or tend to refute such a suggestion. Therefore, we cannot say the trial court's finding that defendant failed to establish a *prima facie* case of purposeful

discrimination by the prosecution's exercise of peremptory challenges is against the manifest weight of the evidence.

Defendant's second claim of reversible error during jury selection is that the trial judge questioned two sworn jurors and one prospective juror, then excused all three for cause, without defendant's being present (defense and prosecution counsel and a court reporter were present). This claim is controlled by our recent decision of *People v. Bean* (1990), 137 Ill. 2d 65, 78-89. The legal arguments defendant presents here are virtually identical to those presented by the defendant in *Bean*: Defendant had a constitutional right to be personally present at the questioning of these jurors in chambers, his attorney had no power to waive this right, and the trial court committed reversible error by denying him this right. In *Bean,* we held that although criminal defendants have a broad right to be present at every stage of trial, including throughout jury selection, under either the Illinois or the United States Constitution unconstitutional violations of this right requiring reversal of a conviction and remand for a new trial occur only when as a consequence a defendant is deprived of a fair and just trial, such as when a defendant is tried by a prejudiced jury. If the jury which tried a defendant appears to have been impartial, the defendant's constitutional rights were not violated even though he was absent from the in-chambers *voir dire* of one or more venire members, for both the Illinois and the United States Constitutions guarantee defendants a jury that is impartial, not a jury of their choice. Even though the facts in this case differ from those in *Bean,* our holding in *Bean* is applicable. We will, however, briefly review these facts.

All three of these jurors were excused for cause by the trial judge. The two sworn jurors were both excused

because aspects of their personal life caused them to doubt that they could concentrate on the evidence presented at trial and fulfill their duties as jurors. The trial judge asked both defense and prosecution counsel if they wished to question either of these jurors; they did not. He then asked if there was any objection to excusing these jurors for cause; there was not. Concerning the prospective juror excused for cause, she had already submitted to questioning by the trial judge and defense and prosecution counsel when the bailiff informed the trial judge this woman had been convicted for unlawful use of weapons, a conviction she had never mentioned (though asked if she had ever been the accused in a criminal case) or written on her juror information card. After questioning her in chambers, the judge excused her for cause, finding that her failure to disclose the conviction, after taking an oath as a venire member to tell the truth, indicated she would not properly do her duty as a juror; defense counsel objected, believing this woman had simply made a mistake.

On these facts, we find that defendant's absence from this in-chambers questioning did not deprive him of an impartial jury, and so does not warrant reversal of his conviction. Each of these three jurors was excused for cause by the trial judge; as the time for the parties to exercise peremptory challenges and challenges for cause had passed, the utmost that defendant could have done if present would have been to register his own objections to these excusals. Yet, as the decision whether to excuse a juror is within a trial judge's discretion (*People v. Cole* (1973), 54 Ill. 2d 401, 414), and the trial judge in this case clearly acted within his discretion, we cannot conclude that defendant's presence would have had any real effect. More importantly, as we found in *Bean,* the record does

not indicate that the jurors who served in the place of the three people who were excused were prejudiced against defendant. There was no reversible error.

Legality of the Warrantless Arrest

According to defendant, the trial court erred when it denied his pretrial motion to quash his warrantless arrest and to suppress his oral and written statements admitting his part in the sexual assault and murder of Boyd, which he made after being arrested. In denying this motion, the trial court found both that defendant's mother consented to the police entry into her home and that exigent circumstances justified the police's failure to procure an arrest warrant. We will not reverse the trial court's denial of defendant's motion to quash and suppress unless it was clearly erroneous. *People v. White* (1987), 117 Ill. 2d 194, 209; *People v. Clark* (1982), 92 Ill. 2d 96, 99.

At the hearing held on this issue, two police officers who participated in the arrest testified, as did defendant's mother. The account given by the officers of how the police gained entry to the apartment that defendant and his mother shared differed from the account given by defendant's mother.

Detectives Almanza and Tuider described the events of July 17, 1986, as follows. Almanza and other police officers talked to Alonzo Woodard at Area 3 headquarters. Alonzo said he had been at the party on the night of July 12-13 when defendant and Curtis Croft brought Boyd into a separate room; Alonzo later heard Boyd screaming; when Alonzo tried to enter the room, defendant angrily told him to get out. Almanza, Tuider, three other detectives, and Alonzo Woodard drove to defendant's apartment in two

unmarked squad cars; a marked squad car with two uniformed police officers was also present. None of the officers had an arrest warrant. At approximately 5:30 p.m., Almanza and Tuider knocked on the front door of defendant's apartment; there was no response, so they returned to their car. At approximately 6:25 p.m., a car which Alonzo identified as defendant's was driven into the parking lot. Almanza and Tuider walked to the car and asked the driver his name; it was Croft. Croft was arrested and was read his *Miranda* rights. Tuider talked to Croft. Croft said he knew the police were there because of the girl's murder, but he did not "do it," defendant did. Croft also said that defendant was in his apartment, waiting for Croft. On hearing this, Almanza, Tuider, a third detective, and a uniformed officer returned to the apartment. While Tuider and the uniformed officer watched one exit, Almanza and the other detective knocked on the front door. Defendant's mother opened the door. Almanza identified himself as a police officer and asked if defendant was home, to which defendant's mother answered "yes"; according to Almanza, she then stepped back and pointed toward a bedroom. Almanza thanked her and he and the other detective walked into the bedroom, saw defendant, and arrested him. At this point, there were only two officers in the apartment and neither had drawn his gun. A few minutes later, Tuider and one or two uniformed officers entered. Defendant was handcuffed and taken to Area 3 headquarters.

Defendant's mother told a different version. She testified that on opening the door she saw five or six police officers with guns in their hands (on cross-examination she said she remembered seeing only two guns). These officers "just rushed in and asked me was Demetrius

Henderson there"; when the officers asked this, they were in her home without first having asked her permission to enter. She said defendant was in his bedroom. The officers entered the bedroom, arrested defendant, and handcuffed him. On cross-examination, defendant's mother said she had not heard the police knocking on the door at 5:30 p.m., although she had been home. Inconsistencies in her testimony were also revealed.

The trial court found that the police officers had had probable cause to arrest defendant, that they had received consent to enter the apartment from defendant's mother, and that exigent circumstances had existed to validate the warrantless arrest. In finding consent, the court first found the testimony of the officers to be more credible than that of defendant's mother. The court then found that defendant's mother consented to the entry by telling the two officers, who used no force and had their guns holstered, that defendant was home and "by stepping back from the door and pointing to the bedroom." The court gave weight to the fact that defendant's mother "did not say to them, do not come in. She did not say to them any words to indicate to the police that they should not enter."

Defendant appeals this ruling, asserting that even if the officers' version is accepted, the actions of defendant's mother in stepping back from the open front door and pointing to a bedroom cannot be considered consent to the police's entering her apartment. Rather, her actions were a mere acknowledgment that defendant was home. Furthermore, as support for its ruling, the trial court erroneously relied on the failure of defendant's mother to object to the police's entry for a failure to object cannot be equated with consent to enter. Defendant cites a Federal appellate case holding that consent to enter must be

"'unequivocal and specific.'" (*United States v. Gay* (10th Cir. 1985), 774 F.2d 368, 376 (search of automobile), quoting *United States v. Recalde* (10th Cir. 1985), 761 F.2d 1448, 1453.) In defendant's opinion, because the officers never asked permission to enter the apartment of defendant's mother, she could not have consented to a request that was never made. Protecting the sanctity of the home demands "more to overcome the warrant requirement than an ambiguous gesture made in response to an inquiry that concededly did not even constitute a request to enter." For these reasons, defendant believes the prosecution failed to prove that there was valid consent (*see People v. White* (1987), 117 Ill. 2d 194, 221).

Defendant's argument suggests that the unequivocal and specific consent that is necessary can only exist if the police expressly ask to enter and are verbally answered in the affirmative; conduct or body language of an occupant of a home is insufficient. Defendant relies on two factually similar cases in which consent to enter was found not to have been given. Our appellate court, in *People v. Johnson* (1981), 99 Ill.App.3d 863, held that the trial court did not err when it found that the police had not been given consent to enter defendant's home, and so granted defendant's motion to quash his arrest and suppress evidence. In response to the knock of two police officers, defendant's grandmother opened the main front door but left the screen door closed; the officers identified themselves and, seeing the suspect they were looking for on the stairs inside the house, one officer told defendant's grandmother they wanted to arrest him; at that, she opened the screen door; the officers entered and arrested defendant. When defendant's grandmother opened the screen door she did not orally invite the officers to enter, nor did she tell them

not to enter. The appellate court held that, because the police never asked permission to enter the home and because there was no evidence of the grandmother's subjective state of mind, which is necessary to determine the voluntariness of consent, her conduct in merely opening the door in response to the officer's statement that they wanted to arrest the man they saw was not voluntary consent but merely "'acquiescence to a claim of lawful authority,'" which the Supreme Court found to be insufficient in *Bumper v. North Carolina* (1968), 391 U.S. 543, 548-49, 20 L. Ed. 2d 797, 802, 88 S. Ct. 1788, 1792. (*Johnson,* 99 Ill.App.3d at 865.) Defendant also relies on a case from the Colorado Court of Appeals, holding that a trial court erred in finding that "passive consent" to a police entry was given by the defendant's mother when she did not object when officers pushed past her and entered her home; a mere failure to object to police entry into one's home is not clear affirmative evidence of consent. *People v. Santisteven* (Colo.App.1984), 693 P.2d 1008.

In response, the State contends that the conduct of defendant's mother, in the absence of any show of force by the police, constituted voluntary consent, and that the trial court's finding of consent was largely a finding of fact and so is not to be reversed unless against the manifest weight of the evidence (*People v. Clark* (1982), 92 Ill. 2d 96, 99 (reverse ruling on a motion to suppress only if clearly unreasonable)). The State also distinguishes the two cases upon which defendant relies. *Johnson* was simply decided wrongly, for by opening the screen door defendant's grandmother gave her consent. Moreover, whereas *Johnson* was in part decided on the grounds that there was no evidence of the grandmother's state of mind,

in the present case defendant's mother did testify, testimony to which the trial court gave little weight. *Santisteven* is easily distinguishable by the lack of any evidence of affirmative conduct in that case, there being only evidence of a failure to object.

We find that the trial court's determination that defendant's mother consented to the police entry was not clearly erroneous (and therefore do not address the other ground for the trial court's denial of defendant's motion – the existence of exigent circumstances). Defendant's inculpating statements to the police were admissible.

The fourth amendment (U.S. Const., amend. IV) bars warrantless and nonconsensual arrests in the home, absent exigent circumstances. (*Payton v. New York* (1980), 445 U.S. 573, 63 L. Ed. 2d 639, 100 S. Ct. 1371.) Yet, what words or conduct constitute consent to enter a home has never been explicated by the Supreme Court. (But *see Bumper,* 391 U.S. 543, 20 L. Ed. 2d 797, 88 S. Ct. 1788 (defendant's grandmother's allowing police to enter after they falsely claimed to have a search warrant was not voluntary consent, but the product of coercion).) Although the lower courts generally agree that consent to enter a residence validates a warrantless arrest (2 W. LaFave, Search & Seizure § 6.1(c), at 582 (2d ed. 1987) (and cases cited)), there is little authority as to what constitutes consent in the absence of an express verbal statement. But *see United States v. Briley* (8th Cir. 1984), 726 F.2d 1301 (valid consent was given when defendant's girlfriend told police officers defendant was in her apartment and they should come with her, and girlfriend then opened apartment door wide and gestured toward defendant, who was standing in the apartment; police entered and arrested defendant); *State v. Blair* (Mo.1982), 638 S.W.2d 739

(consent given by woman's opening apartment door in response to police officer's knock, and, after officer asked if defendant were there, opening door wide and stepping back; officer then walked to back of apartment and arrested defendant).

This court has held that a warrantless arrest in the home is rendered valid when the police are given voluntary consent by a defendant or a third party who has control over the premises. (Compare *People v. Bean* (1981), 84 Ill. 2d 64, 69-70 (defendant's mother expressly invited police to enter and they did not need to get consent to advance past threshold and enter another room), with *People v. White* (1987), 117 Ill. 2d 194, 221 (no consent when police pushed past man who opened front door without requesting his permission to enter).) But this court has not decided what standard the alleged consent has to meet or whether the consent needs to be unequivocal and specific. We now hold that, when a court is deciding whether consent was given (not whether that consent was voluntary), the circumstances must have been such that the police could have reasonably believed they had been given consent to enter. (*Cf. Illinois v. Rodriguez* (1990), 497 U.S. ___, 111 L. Ed. 2d 148, 110 S. Ct. 2793 (search of home valid if police given consent to enter by one they reasonably believed had authority to consent).) This test is consistent with the fourth amendment's proscription "against unreasonable searches and seizures." *See* 3 W. LaFave, Search & Seizure § 8.1(b), at 156-59 (2d ed. 1987).

In the present case, we find that when defendant's mother said defendant was in the apartment and then stepped back from the open door and pointed toward defendant's bedroom, the police officers' belief that she

was consenting to their entry into the apartment was a reasonable belief. Her conduct was a wordless invitation to enter, and faced with this conduct the officers need not have asked for permission to enter and received verbal confirmation. Furthermore, although a failure to object alone cannot be considered consent to enter (*People v. Santisteven* (Colo.App.1984), 693 P.2d 1008), the trial court was justified in giving some weight to the absence of any objection by defendant's mother, for this was some evidence from which the officers could reasonably have inferred consent to enter. Although defendant's argument is limited to asserting that there was no consent, we also find that the consent was voluntary and extended to defendant's bedroom. (*See Bean,* 84 Ill. 2d at 70 (once invited into apartment, police could walk throughout it looking for defendant; they did not have to wait for defendant to confront them); *see also State v. Filiatreau* (1981), 274 Ark. 430, 625 S.W.2d 494.) Nor did the officers need to announce their intention to arrest defendant before entering through the open door. (*See Briley,* 726 F.2d at 1305; 3 W. LaFave, Search & Seizure § 6.1(c), at 583 (2d ed. 1987) (fourth amendment merely requires consent to enter a home, not consent to enter in order to carry out a specified purpose).) For these reasons, we find that the trial court's ruling that the conduct of defendant's mother constituted consent was not clearly erroneous (*see White,* 117 Ill. 2d at 209).

Evidentiary Issues

Defendant contends that errors made by the trial judge in admitting certain evidence require the reversal of his conviction and granting of a new trial. We disagree, for

we find that, as to each of these evidentiary issues, no error was made.

Defendant believes that the admission of portions of Detective Tuider's and Assistant State's Attorney Murray's testimony deprived him of his sixth amendment rights to confront and cross-examine witnesses against him (U.S. Const., amend. VI). Defendant asserts that the prosecutor's questions, and the answers given by Tuider and Murray, were improper because they obliquely suggested that codefendant Alonzo Woodard and other codefendants had told the police that defendant was involved in the sexual assault, kidnapping, and murder of Boyd. Defendant believes that this line of questioning was comparable to admitting a codefendant's confession that directly implicates a defendant, which the Supreme Court has held violates a defendant's sixth amendment rights (*Bruton v. United States* (1968), 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620; *cf. Richardson v. Marsh* (1987), 481 U.S. 200, 95 L. Ed. 2d 176, 107 S. Ct. 1702 (codefendant's statement with references to defendant redacted is admissible); *see also People v. Cruz* (1988), 121 Ill. 2d 321 (defendant's sixth amendment rights violated when police officers testified to statements made by one of two codefendants, even though the officers substituted the words "some friends" and "two other named individuals" for names of defendant and other codefendant, because circumstances of the trial created obvious implication that defendant was one of these "friends")).

Tuider's and Murray's testimony showed that, on July 17, Tuider interviewed defendant, who denied knowing anything about Boyd's murder. Murray then talked to Campbell, Croft, Alonzo Woodard, and two girls who had attended the party on the night of July 12-13, developing

information about the murder. Murray then reinterviewed defendant. Murray testified that defendant initially told him that, although he had been at the party, nothing eventful occurred, and at some time he fell asleep and slept until the next morning. Murray told defendant "that what he told me was inconsistent with what other witnesses had told me." It is this statement that defendant finds prejudicial as suggesting that the "other witnesses," including his codefendants, had implicated defendant in these crimes.

The portion of Tuider's testimony that defendant highlights involved the issue of whether defendant became a "suspect" after the police talked to Alonzo Woodard. On redirect examination, Tuider and the prosecutor had this exchange:

> "Q. Mr. Linn asked you some questions about Curtis Croft being the first suspect in this case, do you recall those questions, detective?
>
> A. Yes, sir, I do.
>
> Q. So it's clear for the ladies and gentlemen, when Curtis Croft was a suspect or the first suspect, as Mr. Linn characterized him, that was based on information that you or your brother officers had developed from Alonzo Woodard, is that correct?
>
> A. Yes, sir.
>
> Q. And would it be fair to characterize the status of the suspects in the case at that time as not only being Curtis Crawford or Curtis Croft, but also being Demetrius Henderson?"

At this point defense counsel objected, and, during a sidebar, argued that Tuider was telling the jury that

Alonzo had incriminated defendant. The trial judge said that, though these questions violated "the spirit of the severance," they were in response to defense counsel's cross-examination of Tuider when Tuider had answered yes to the question whether Croft had been the "first suspect" in the murder of Boyd (the prosecutor had objected to this question and use of the word "suspect," and the trial judge had said he would "give [the prosecutor] an opportunity on re-direct"); the trial judge allowed the trial to proceed without expressly ruling on defense counsel's objection. The prosecutor never got an answer to his question whether defendant became a "suspect" after the police talked to Alonzo, but he did subsequently elicit testimony from Tuider that after the police talked to Alonzo they began looking for both Croft and defendant. In addition, the prosecutor asked one final question on this subject: Did all of this occur after the police talked to Alonzo?, but an objection to this question on unspecified grounds was sustained.

The State presents a number of grounds on which the prosecutor's questions and Tuider's and Murray's answers were proper. First, the question to Tuider about whether defendant became a "suspect" after the police talked to Alonzo was invited by defense counsel's cross-examination of Tuider. (*See, e.g., People v. Piscotti* (1985), 136 Ill.App.3d 420 (in closing argument, prosecutor could properly comment on defense theory of case that police fabricated evidence).) Second, the questions and answers allowably explained to the jury the steps taken by the police in investigating Boyd's murder. (*See People v. Johnson* (1987), 116 Ill. 2d 13, 24 (defendant's sixth amendment rights not violated when police officer testifies to steps taken in police investigation, even if narrating sequence of

steps shows that police began looking for defendant after talking to codefendant, thus suggesting that codefendant implicated defendant; but defendant's rights are violated when officer testifies to content of codefendant's statements).) Third, by detailing the steps of the police investigation the prosecutor refuted the defense's insinuations throughout the trial that this investigation was hurriedly conducted and defendant's arrest and indictment were the result of sloppy and inadequate police work.

We find that defendant's sixth amendment rights were not violated by either the prosecutor's questions or the witnesses' answers. The situation that existed here was not at all similar to those in the cases defendant cites (*see Bruton,* 391 U.S. 123, 20 L. Ed. 2d 476, 88 S. Ct. 1620; *People v. Hernandez* (1988), 121 Ill. 2d 293; *People v. Cruz* (1988), 121 Ill. 2d 321; *Johnson,* 116 Ill. 2d 13). In each of those cases, the actual substance of a codefendant's statement implicating himself and the defendant was admitted at trial. In stark contrast, neither Tuider nor Murray recounted the content of the statements made by Alonzo Woodard. Tuider said only that after talking to Alonzo the police began looking for defendant. Murray said only that the other witnesses who had been interviewed had said something other than that nothing eventful happened that night until defendant fell asleep at Croft's house. The mere fact that one of the many inferences which the jurors could have drawn from this testimony was that Alonzo told the police defendant had sexually assaulted and murdered Boyd does not mean that defendant was denied his sixth amendment rights when Alonzo did not testify at trial.

This court has held that testimony recounting the steps taken in a police investigation is admissible and does not violate the sixth amendment, even if a jury would

conclude that the police began looking for a defendant as a result of what nontestifying witnesses told them, as long as the testimony does not gratuitously reveal the substance of their statements and so inform the jury that they told the police that the defendant was responsible for the crime. (*See Johnson,* 116 Ill. 2d at 24.) The testimony here merely related the conduct of the investigation; the fact that it appears that something Alonzo said caused the police to look for defendant does not mean that defendant had a right to cross-examine Alonzo – there was simply nothing to cross-examine him about, given that the content of his statement to the police was never disclosed at trial. Similarly, Murray's testifying that he told defendant that others had said something different from what defendant had told him, which prompted defendant to inquire into what Croft had said and, subsequently, to confess, left nothing about which defendant could cross-examine those others. In short, unlike the cases defendant has cited, here there was no testimony comparable to a codefendant's confession from which a jury could clearly discern that a codefendant had said defendant was guilty. Because no such conclusion could reasonably be drawn, and because the substance of the statements of Alonzo and others was never even hinted at, defendant had no constitutional right to confront or cross-examine them.

In fact, by comparing the testimony in this case to the testimony in *Johnson* defendant weakens his own argument. In *Johnson,* the substance of the codefendants' statements was explicitly made known to the jury when the prosecutor specifically asked a police officer multiple times whether both codefendants had said defendant was the "shooter." By contrast, the substance of Alonzo's statements never was revealed. Defendant seems to

recognize this flaw, for he focuses on Tuider's acknowledgement, in response to the prosecutor's question, that defendant had at that time become a "suspect." Yet, this point does not change our conclusion because the substance of Alonzo's statement was still not revealed, unlike the situation in *Johnson* and the other cases cited, and because defense counsel, as noted above, invited this question.

Defendant also contends it was error for the prosecutor to say in his closing argument that the police talked to Alonzo and "he is kind of helping * * *. He gives them certain information. He tells them about Croft and Henderson." While this isolated statement was improper because it suggested the content of Alonzo's statements to the police, the trial court sustained a defense objection to it and we cannot say that it substantially prejudiced defendant; we therefore find it was not reversible error. *See People v. Baptist* (1979), 76 Ill. 2d 19, 29.

Yet another error was made warranting reversal of his conviction, claims defendant, when his entire confession was admitted into evidence and read to the jury. After describing the sexual assault and murder in detail, defendant stated in his confession that he decided to murder another person, his mother's boyfriend:

> "A. I was going to take care of some more busines[s]. I was going to kill somebody else who did something wrong to my mother.
>
> * * *
>
> Q. Why did you go to 71st and Paulina?
>
> A. Because I wanted some revenge to this person named Tracy Smith, who accidentally punched my mother in the mouth.

Q. Why did you go to do this at this time in the morning?

A. Because I felt bad about it, I had already done something dirty and said fuck it, I might as well finish it off."

But Smith had not been home. Defendant then told Croft to ditch the knife; Croft threw the knife into a garbage can. Afterwards, they drove to Croft's house and changed their clothes.

Before the confession was read, defense counsel moved for redaction of all statements regarding defendant's intention to kill Smith. The trial judge denied the motion, reasoning that it appeared that one defense theory would be that the confession was involuntary, the product of a police beating; this theory would be disproved by defendant's statement that he had intended to murder someone for reasons unrelated to Boyd's murder. When asked by the judge to reveal whether this theory would be raised, defense counsel refused to do so, arguing that the proper method would be to introduce the redacted confession during the prosecution's case; if the defense later raised this theory, the entire confession could then be introduced. The trial judge decided against using this procedure, admitting the entire confession into evidence during the prosecution's case. Later, after the defense had rested, the judge acknowledged that no evidence of the confession's involuntariness had been produced; still, the judge believed the portion of the confession quoted above was admissible "because it has to do with the defense theory that Mr. Henderson didn't commit the crime at all and it's probative of the issue as to how that would have arisen in the course of the statement being given if Mr. Henderson was not responsible for the crime and was indicating

things that related to this crime. Why would there be other things in there?"

Defendant cites decisions of this court holding that evidence that a defendant has committed crimes other than the crime for which he is being tried is inadmissible if irrelevant to any material issue, such as criminal intent or identification, for such evidence serves only to persuade a jury that the defendant has a propensity to commit crimes. (*E.g., People v. Lindgren* (1980), 79 Ill. 2d 129.) If a competent confession contains references to other crimes defendant has committed, those references have to be deleted before the confession is admitted into evidence unless the confession's evidentiary value would be seriously impaired. (*People v. Gregory* (1961), 22 Ill. 2d 601, 603-04; *People v. Oden* (1960), 20 Ill. 2d 470, 481.) Defendant argues that this portion of his confession lacked any probative value but was highly prejudicial, for after the jury learned that he was willing to kill a man who had accidentally punched his mother, it would have concluded he had a propensity to murder, and so been overpersuaded that he had killed Boyd.

We agree with defendant; these statements were irrelevant and should have been redacted from his confession. We reject the State's arguments that these statements were relevant because they showed how and where defendant disposed of the murder weapon (the murder weapon was never found and the defense suggested throughout trial that the police investigation was sloppy and hurried) and because in saying he "had already done something dirty" and he "might as well finish it off" defendant revealed a consciousness that he was guilty of Boyd's murder (*see People v. Bean* (1990), 137 Ill. 2d 65, 108-09 (defendant's threats to murder others admissible

because were made as part of plan to evade arrest and so showed consciousness of guilt)). The State's first relevancy argument is refuted by the fact that we were able to quote all of defendant's statements of intent to kill Smith without including his description of how the murder weapon was thrown away. As to the statements' relevancy to show consciousness of guilt, we first note the low probative value of defendant's statement that he "had already done something dirty," for, immediately before saying this, he had described in detail how he had sexually assaulted and murdered Boyd; we doubt the jury was any more convinced of defendant's guilt by hearing that, after murdering Boyd, he realized that what he had done was wrong. Furthermore, we have discovered that the confession could have been redacted in such a way as not only to include the statements showing consciousness of guilt while omitting the statements of defendant's intent to kill Smith, but also to avoid any awkwardness that would have indicated to the jury that the confession had been redacted (and thus possibly have caused the jury to doubt the confession's voluntariness).

Yet the trial court's error in admitting defendant's entire confession into evidence was not reversible error. At no other time during trial did the prosecutor again refer to defendant's intention to kill Smith or try to persuade the jury that defendant's desire to kill Smith increased the likelihood that he had murdered Boyd. These once-mentioned statements were also not significantly prejudicial in nature because defendant merely expressed an intent, never realized, to kill Smith, which is far less prejudicial than is an actual admission to another crime (*see Gregory,* 22 Ill. 2d at 604 (defendant's admission to other armed robberies would have persuaded jury he was

hardened criminal)). And these statements, viewed within the context of defendant's entire confession, do not manifest his possession of a propensity to murder before he murdered Boyd; rather, it appears he formed an intent to kill Smith only after, and in part because, he had murdered Boyd; thus, any propensity to murder was evidently created by his act of murdering Boyd. Finally, any prejudicial effect produced by these statements was overshadowed by the substantial evidence of defendant's guilt: his confession, corroborated by a police officer and assistant State's Attorney; Anthony Woodard's testimony describing the sexual assault and defendant's driving off with Boyd in the trunk of his car; and testimony by two others placing him and Boyd at the party on July 12-13. For these reasons, we conclude that the jury's verdict of guilty did not result from the error of admitting the confession unredacted. *See People v. Lindgren* (1980), 79 Ill. 2d 129, 140-41; *People v. Bailey* (1980), 88 Ill.App.3d 416, 422 (harmless error to admit "other crimes" evidence where remaining evidence proved defendant's guilt beyond reasonable doubt).

Defendant also believes he was deprived of a fair trial by the prosecutor's evocation of inadmissible testimony indirectly disclosing that Anthony had made prior statements to the police consistent with his trial testimony. On direct examination, Anthony testified that the only reason his brother Alonzo and Campbell had sexually assaulted Boyd, and the only reason Anthony did not try to physically stop the assault or flee and get help, was that defendant and Croft had held knives on them. Defense counsel's cross-examination impeached Anthony's credibility by establishing that he wanted to help his brother, whom he loved, and Campbell, who was like a cousin to him (Alonzo

and Campbell were also on trial for the sexual assault, kidnapping, and murder of Boyd). Then, on redirect, the prosecutor asked, "Anthony, did you tell the police officers that night essentially the same thing that [you're] telling the ladies and gentlemen of the jury?" to which Anthony answered, after defense counsel's objection was overruled, "Yes, something like that."

Evidence of a prior consistent statement is inadmissible hearsay unless it has been suggested that a witness recently fabricated testimony or has a motive to testify falsely and the prior statement was made before the motive arose. (*E.g., People v. Harris* (1988), 123 Ill. 2d 113, 139.) Defendant argues that in this case the exception to the rule that prior consistent statements are inadmissible does not apply, for while defense counsel's cross-examination suggested Anthony had a motive to lie – in order to exonerate his brother and Campbell by putting all the blame on defendant and Croft – at the time Anthony talked to the police on July 17 he would have had the same motive – he would have wanted to protect his brother and Campbell then, too.

Defendant is correct; there is no doubt that the prosecutor erred in asking a question formulated to elicit testimony from Anthony that he had made a prior consistent statement, and there is no doubt that the trial court erred in admitting this testimony. Anthony's motive to lie to protect his brother and Campbell would have existed when he talked to the police as well as when he testified – at neither time would he have wanted to implicate them. We note also that defense counsel suggested Anthony might have lied in order to protect himself from criminal prosecution; but this motive to lie would also have existed both on July 17 and at the time of trial.

As defendant recognizes, however, the fact that this was error is not enough because the error was waived when defendant failed to include it in his post-trial motion. (*People v. Enoch* (1988), 122 Ill. 2d 176, 187.) Defendant therefore urges us either to recognize it as plain error (107 Ill. 2d R. 615(a)) or to find that defense counsel's failure to include this issue in the post-trial motion constituted ineffective assistance of counsel, denying defendant his sixth amendment right to counsel (*Strickland v. Washington* (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052; *People v. Albanese* (1984), 104 Ill. 2d 504; U.S. Const., amend. VI). We decline to do so.

The plain error doctrine provides that a court of review may notice waived errors if either the evidence is closely balanced or "the error is so fundamental and of such magnitude that the accused was denied a fair trial" and remedying the error is "necessary to preserve the integrity of the judicial process." (*People v. Herrett* (1990), 137 Ill. 2d 195, 210.) As we have already stated, the evidence in this case was not closely balanced. Nor do we find that defendant was denied a fair trial as a result of this portion of Anthony's testimony.

The prejudicial nature of evidence of prior consistent statements is judged on a case-by-case basis. Admittedly, it is possible the jury saw Anthony as more credible because he said he had given the police the same account four days after the murder, and people are more apt to believe what is repeated. (*See People v. Smith* (1985), 139 Ill.App.3d 21, 32.) But the prejudicial effect of this testimony was minimized by the fact that, unlike some cases relied upon by defendant where one witness corroborated another's testimony by testifying that the other made a prior consistent statement, here Anthony himself provided the

evidence of his own prior consistent statement, and so his credibility was not truly enhanced; in other words, the jury would not have been inclined to attribute a great deal more credibility to Anthony's testimony because he had corroborated himself. (*Cf. People v. Emerson* (1983), 97 Ill. 2d 487, 499 (both police officer and witness testified that shortly after crime occurred witness identified defendants as perpetrators); *Smith,* 139 Ill.App.3d at 31 (eyewitness to shooting testified defendant was perpetrator, and friend testified that shortly after shooting eyewitness told him the same).) Other circumstances also minimize the prejudiciality of this testimony: The testimony was general, not specific, in that Anthony said he told the police "something like" what he had testified to; no portion of Anthony's statement to the police was admitted into evidence (*cf. Harris,* 123 Ill. 2d at 141 (witness' entire grand jury testimony introduced)); and at no other time during the trial was there a reference, general or specific, to what Anthony told the police.

Lastly, failing to include this claim in a post-trial motion is not the mark of ineffective counsel. This error was not so seriously prejudicial that no reasonably competent attorney, who was intimately familiar with the case after having conducted the defense at trial and having heard this testimony along with all other evidence at trial, would have failed to conclude that it resulted in defendant's being deprived of a fair trial and would have failed to include the error in a post-trial motion for a new trial. Nor is it reasonably probable that if this error had not occurred the jury would have had a reasonable doubt respecting defendant's guilt. *See Strickland,* 466 U.S. at 687-96, 80 L. Ed. 2d at 693-99, 104 S. Ct. at 2064-69 (establishing standards for reasonably effective assistance

of counsel and when ineffectiveness warrants setting aside conviction).

Defendant claims that the trial court committed reversible error by refusing to give the "accomplice witness" instruction:

> "When a witness says he was involved in the commission of a crime with the defendant, the testimony of that witness is subject to suspicion and should be considered by you with caution. It should be carefully examined in light of the other evidence in the case." Illinois Pattern Jury Instructions, Criminal, No. 3.17 (2d ed. 1981) (hereinafter IPI Criminal 2d No. 3.17).

According to defendant, although Anthony Woodard was not indicted, he could have been, because circumstantial evidence established probable cause to believe that he was guilty of an offense (defendant fails to specify which), at least as an accomplice and on the theory of accountability, and that he knew of the plan to kill Boyd. Therefore, defendant states, the giving of IPI Criminal 2d No. 3.17 was warranted. Here, and at the jury instructions conference, defendant points to Anthony's presence during the sexual assault without objecting or intervening (allegedly showing his acquiescence to it), and to his decision not to leave the company of the other men after the assault or even after hearing defendant say Boyd would have to be killed and seeing Boyd led blindfolded to defendant's car. Further, defendant surmises that Anthony would have aided in executing the plan to kill Boyd if defendant's car had not been lost in traffic. Also, Anthony did not volunteer information to the police about what happened that night until the police brought him in for questioning. As to Anthony's testimony that he stayed in the room solely

because he was afraid of being stabbed if he tried to leave, and his denial of active involvement in the sexual assault and kidnapping, defendant says this testimony was not credible.

The trial court refused to give this instruction both because Anthony never said he was involved in any offense (the instruction reads, "When *a witness says* he was involved in * * * a crime with the defendant" (emphasis added)) and because there was no evidence, from anyone including defendant, that Anthony participated in any illegal conduct. Defendant argues that the circumstantial evidence was such that Anthony's denials should have been disregarded and the instruction given. As defendant failed to raise this issue in his post-trial motion, we must decide not only whether the trial court erred when it refused the instruction, but also whether it was plain error to do so.

We find that the trial court correctly determined that Anthony was not an accomplice and so correctly rejected defendant's tender of IPI Criminal 2d No. 3.17. In the past, this court has clearly enunciated the test for determining whether a witness was an accomplice, entitling a defendant to an accomplice-witness instruction: If there is probable cause to believe he was guilty as a principal or as an accessory on the theory of accountability. (*People v. Cobb* (1983), 97 Ill. 2d 465, 476; *People v. Robinson* (1974), 59 Ill. 2d 184, 191.) An accomplice is not one who merely "'has guilty knowledge or * * * who was even an admitted participant in a related but distinct offense. To constitute one an accomplice he must take some part, perform some act or owe some duty to the person in danger that makes it incumbent on him to prevent the commission of the

crime.'" (*Robinson,* 59 Ill. 2d at 191, quoting *People v. Hrdlicka* (1931), 344 Ill. 211, 222.) Yet,

> "'"[w]hile mere presence or negative acquiescence is not sufficient to constitute a person a principal to a crime, one may aid and abet, without actively participating in the overt act, and if the proof shows he was present at the crime without disapproving or opposing it, the trier of fact may competently consider this conduct in connection with other circumstances and thereby reach a conclusion that such person assented to the commission of the criminal act, * * * thereby aiding and abetting the crime. [Citations.]"'" (*Robinson,* 59 Ill. 2d at 191-92 (quoting *People v. Richardson* (1965), 32 Ill. 2d 472, which quoted *People v. Clark* (1963), 30 Ill. 2d 67, 72).)

Also instructive is the statute specifying that one is legally accountable for another's criminal acts if, "before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." Ill. Rev. Stat. 1985, ch. 38, par. 5-2(c).

Thus, an accomplice-witness instruction should be given to a jury if the totality of the evidence and the reasonable inferences that can be drawn from the evidence establish probable cause to believe not merely that the person was present and failed to disapprove of the crime, but that he participated in the planning or commission of the crime; if probable cause is established the instruction should be given despite the witness' protestations that he did not so participate. *Cobb,* 97 Ill. 2d at 476; *People v. Carreon* (1987), 162 Ill.App.3d 990, 993.

Here the evidence simply does not establish probable cause that Anthony participated in the planning or commission of the sexual assault, kidnapping, or murder of Boyd, or that he aided and abetted these crimes by being present and implicitly approving them. The only evidence as to what happened that night is Anthony's testimony and defendant's confession. Anthony testified that during the assault he merely sat in a chair and did not harm Boyd in any way or encourage the others to harm her; in fact, he told defendant and Croft to stop. Defendant's statement confirms this; while it details the assault committed by the others, it does not state that Anthony took part. Nor was there evidence that Anthony knew ahead of time that defendant planned to assault Boyd; indeed, it appears defendant's decision to do so was spontaneous. And although Anthony and defendant said that Anthony was present during a portion of the kidnapping, when Boyd was blindfolded and led out to defendant's car, there was no evidence that Anthony saw her being put into the trunk. As for the murder, it is undisputed that Anthony was not present. Though Anthony testified he heard defendant say Boyd would have to be killed, he also testified that he and Alonzo offered to take Boyd home but defendant and Croft said they would and drove off; and when defendant's car passed the street where it should have turned to go to Boyd's house, Alonzo honked his car horn but defendant's car continued on and Alonzo eventually lost it. Defendant's confession also counters Anthony's involvement in the murder, for while defendant said he talked to some of the others about killing Boyd, Anthony was not among them; nor did Anthony help blindfold Boyd and put her into the trunk. Also, defendant said he purposely eluded the second car so that Anthony, Alonzo, and Campbell would not be present when Boyd was murdered.

This evidence does not show that Anthony was an accomplice. If mere presence were enough he would be, but it is not. Even if we disbelieved Anthony's testimony that he told defendant and Croft to stop the assault, the evidence would merely show he was present without voicing disapproval. But to establish probable cause that someone was an accomplice there must be at least some evidence of other circumstances, other conduct, from which it can be inferred that the person approved of the offense and aided it by his mere presence. Here there was no such evidence.

Whether one was an accomplice depends entirely on the facts of the case. The present case is similar to *Robinson,* 59 Ill. 2d 184, which defendant has cited, in which this court held that a defendant was not entitled to an accomplice-witness instruction because his two companions were not accomplices. In *Robinson,* one man ordered a cab and when it arrived the defendant and another friend asked for a ride. During the ride the defendant pulled a gun and shot the cabdriver; the other two men did not try to prevent the shooting. Afterward, they all ran to the house of one of the two men; defendant left a short time later. Approximately two months later one of the two companions went to the police; he explained that he had waited so long to come forward because the defendant had threatened to kill whoever told. This court held that the two men were not accomplices because there was no evidence that they knew about the defendant's plan to shoot and rob the cabdriver or that they did anything to assist the defendant. Thus, probable cause to believe in their guilt as either principals or accessories did not exist. This court so held despite the fact that the only testimony about what had happened and the two men's ignorance of

defendant's plan and failure to assist him came from the two men themselves.

Similarly, in the present case, while defendant urges us to disbelieve Anthony's testimony that he did nothing to assist in the crimes committed against Boyd, the reality is that there is no evidence that he did anything creating probable cause to believe him guilty, and so there is no basis in the evidence to disbelieve his testimony. By contrast, in cases defendant cites which found probable cause existed to believe that a defendant's companion was an accomplice, it could be reasonably inferred from evidence of the companion's conduct that he or she knew of the plan to commit a crime and acted to aid in its commission. *See Cobb,* 97 Ill. 2d 465 (error not to give accomplice-witness instruction despite witness' denying that she knew defendants were going to commit armed robbery, where she had ridden with them in a car for hours, heard them talking about needing a few thousand dollars, obeyed their instructions to wait in car with motor running while they went into diner and, when they ran out of diner, to drive away, heard them say there had been less money than they had expected, and waited three weeks before informing police); *Carreon,* 162 Ill.App.3d 990 (error to not give accomplice-witness instruction where: witness was with defendant while he played pool and cards and was told by defendant that he had lost all of his money to two men and to wait outside; when defendant got ride with same two men, witness came along at defendant's request; after defendant shot men and car crashed, witness waited while defendant went through men's pockets; witness went with defendant to his shop and waited while defendant hid gun and tried to wash blood off money he had taken; and

witness accepted $260 of bloodstained money from defendant, which witness had when arrested).

Defendant argues that yet another reversible error occurred when certain color photographs of Boyd's corpse were admitted into evidence and shown to the jury. Eight photographs taken at the crime scene show the body and the surrounding area, including tire tracks near the body, from various angles and distances. In addition, 10 photographs taken at the morgue show various parts of the body after it and the wounds had been cleaned, but before the autopsy had occurred.

At trial, defense counsel objected to the jury's seeing any photographs of the body. Respecting the crime scene photographs, defendant seems to concede that some were admissible, but argues that showing the jury two of the admitted photographs, which were taken nearer the body and so document its condition in greater detail, unduly prejudiced him, because, as well as being cumulative of the other crime scene photographs, they revealed more gruesome details. The trial judge explained, however, that because defendant denied murdering Boyd, and thus denied the accuracy of his confession describing the sexual assault and murder, photographs corroborative of his confession would be allowed to go to the jury. The record reveals that the trial judge admitted seven of the eight crime scene photographs because he thought that each was independently probative in confirming defendant's statement that he and Croft stabbed Boyd multiple times in this alley, picked her up and threw her to the side of the alley, and then ran over her with a car, as well as corroborating a police officer's testimony regarding the appearance of the crime scene and a forensic pathologist's

testimony regarding the condition of the body, cause of death, and source of the various injuries.

Concerning the photographs taken at the morgue, defendant argues to us, and argued at trial, that the jury should not have been allowed to see any of them because the forensic pathologist who performed the autopsy testified to the character and location of each wound and used a diagram, which was admitted into evidence and allowed to go to the jury, depicting the human body and the location of each wound; the morgue photographs were thus cumulative of this testimony and diagram and so had little probative value, yet were highly inflammatory owing to their gruesome depiction of Boyd's body. The prosecutor argued that the photographs were probative in that they showed not only the location of the wounds, but also their nature and thus the force used to inflict them, characteristics not shown by the diagram. The trial judge allowed some morgue photographs to go to the jury, but excluded others as cumulative or too gruesome.

Whether or not a jury is allowed to see photographs of a decedent is a decision made by a trial judge in the exercise of his sound discretion. (*People v. Nicholls* (1969), 42 Ill. 2d 91.) If photographs are relevant to prove facts at issue, they are admissible and can be shown to the jury unless their nature is so prejudicial and so likely to inflame the jurors' passions that their probativeness is outweighed. (*See People v. Foster* (1979), 76 Ill. 2d 365, 377-78; *People v. Lefler* (1967), 38 Ill. 2d 216, 221.) Moreover, when a defendant in a murder trial pleads not guilty, the prosecution is allowed to prove every element of the crime charged and every relevant fact, even if the defendant offers to stipulate to those same facts. (*People v. Speck* (1968), 41 Ill. 2d 177, 201.) Among the valid reasons

for admitting photographs of a decedent is to prove the nature and extent of injuries and the force needed to inflict them; the position, condition, and location of the body; the manner and cause of death; to corroborate a defendant's confession; and to aid in understanding the testimony of a pathologist or other witness. (*See People v. Owens* (1976), 65 Ill. 2d 83, 90; *Nicholls,* 42 Ill. 2d at 99; *Speck,* 41 Ill. 2d at 203; *People v. Kolep* (1963), 29 Ill. 2d 116, 124.) And while such photographs may be somewhat cumulative of the testimony of a witness, such as a police officer, who described the condition and location of the body, they may also aid jurors in understanding this testimony. *See Owens,* 65 Ill. 2d at 90 (pathologist used photographs to explain wounds); *see also People v. Myers* (1966), 35 Ill. 2d 311, 331 (not abuse of discretion to admit photographs even though police officer testified to body's appearance when found).

In the present case, all of the photographs were sufficiently probative, and minimally prejudicial, that we find the trial court did not abuse its discretion in allowing them to go to the jury. Without detailing what they showed, suffice it to say that the crime scene photographs, showing the general condition of the body and its position in relation to the surrounding area where it was found, were relevant in that they assisted the jurors in deciding whether the physical evidence was consistent with defendant's confession; on the other hand, only a few of the wounds were visible in these photographs and none were unduly cumulative. Concerning the photographs of the body taken at the morgue, they were relevant to show not just the location of the wounds, but also the character, depth, and extent of the various bruises and stab, incised, and other types of wounds. These photographs might have

improved the jurors' comprehension of the pathologist's testimony, as well as corroborating the confession's description of how the various wounds were inflicted. And while we find these photographs to have been relevant, we disagree with defendant's view that they were gruesome and grossly inflammatory; on the contrary, though distressing, they show clean wounds and are nearly as antiseptic and non-inflammatory as photographs of a victim of violent murder could be. *Cf. Lefler,* 38 Ill. 2d 216 (where there was little superficial evidence of fatal injuries on body of seven-month-old infant, court erred in allowing jury even to see color photographs of infant's chest cavity and brain area, taken during autopsy, which at trial were projected onto large screen); *People v. Jackson* (1956), 9 Ill. 2d 484 (where defendant did not deny stabbing decedent, court erred in admitting photograph of decedent's face showing part of sutured autoptic incision); *People v. Garlick* (1977), 46 Ill.App.3d 216 (where defendant confessed killing but pleaded insanity as a defense, court erred in admitting photograph of decedent's massive head wound).

Defendant also contends that comments the prosecutor made during his closing and rebuttal arguments were so improper as to have denied him a fair trial. Defendant categorizes these comments as appeals for sympathy for Boyd and references to her family, and comments explaining why the prosecution had not presented certain scientific evidence.

Among the comments defendant criticizes are the following:

> "There is something about this that rips at my gut. [Objection sustained.]

* * *

* * * [H]ave you ever had the opportunity to sit with a loved one as they are laying in a hospital bed gasping for their last breath * * *?

* * *

Imagine what was going through that young girl's mind when she had to sit laying in that alley looking at the front of that car beating down on her at 35 miles an hour, being struck by the bumper, dragged on the pavement. She was still alive.

* * *

He talks about his rights. What about her rights? Did he ask Kim Boyd prior to taking a knife and plunging it in her head and in her neck, in her butt, in her legs, 'Do you want to talk to your mom before I kill you?' * * * Did he have the compassion to say, 'Do you want to complete high school * * * do you want to get married and have children and have a life with a family * * *?'"

Clearly these comments were improper and were attempts to inflame the jurors' emotions and engender feelings of sympathy for Boyd and her family, causing some prejudice to defendant. (*See, e.g., People v. Hope* (1990), 137 Ill. 2d 430, 491-92, 496-97.) Some also improperly expressed the prosecutor's feelings and invited the jurors to put themselves in Boyd's place. Yet these comments were not so improper as to warrant reversal of the convictions. The first comment quoted was properly dealt with when the trial court sustained a defense objection. As to the other comments, defendant failed to object to them at trial, and his post-trial motion refers to them in only

general terms as remarks made by the prosecutor that cumulatively denied him a fair trial. Thus, defendant has waived any error in relation to them. (*See People v. Pastorino* (1982), 91 Ill. 2d 178, 192 (general objection does not preserve error); *People v. Carlson* (1980), 79 Ill. 2d 564 (to preserve error, defendant must object at trial and in post-trial motion).) Owing to this waiver, we will only notice the prosecutor's comments if they were so improper that their toleration constituted plain error (107 Ill. 2d R. 615(a)). This is not the case, for they did not cause substantial injustice to defendant (*Pastorino,* 91 Ill. 2d at 192); these comments did not effectively deprive defendant of a fair trial because the evidence of his guilt was substantial and was not closely balanced (*see Carlson,* 79 Ill. 2d at 576).

Moreover, even if defendant had not waived these errors we would find reversal to be unwarranted, for the standard of review applied to arguments by counsel is similar to the standard used in deciding if a plain error was made; attorneys are allowed some latitude in closing arguments, and comments constitute reversible error only when they engender substantial prejudice against a defendant (*see, e.g., People v. Tiller* (1982), 94 Ill. 2d 303, 321), such that it is impossible to say whether or not a verdict of guilt resulted from those comments. Here, the evidence of defendant's guilt was substantial enough that we conclude the jury would have returned a verdict of guilty even if the prosecutor had not made these comments. *See Hope,* 137 Ill. 2d at 496 (comments about effect of murder on victim's family, though not warranting reversal of conviction given overwhelming evidence of defendant's guilt, did warrant vacation of death sentence).

The other allegedly improper comments by the prosecutor dealt with the fact, noted by defense counsel in his closing argument, that the prosecution had not presented any evidence that the police had found fingerprints linking defendant to the murder. In rebuttal closing argument, this exchange occurred:

> "[ASSISTANT STATE'S ATTORNEY]: Prints. Did he [Mr. Linn, defense attorney] bring anybody in here? Did you hear any evidence at all about how difficult it is to raise a print?
>
> MR. LINN: Objection.
>
> THE COURT: Overruled.
>
> [ASSISTANT STATE'S ATTORNEY]: Did you hear any evidence, anybody get up on the stand and say, 'Hey, different surfaces leave different prints'? People don't usually leave prints. People who are sweating make certain or aren't able to leave prints.
>
> Anything like that? Call somebody in like an expert?"

A defense objection to the last comments was sustained, but the jury was not instructed to disregard them. (Defendant also complains of the prosecutor's comments suggesting that the reason the prosecution did not introduce results of analyses of swabs taken from Boyd's body was that such analyses would have been useless because the body was not examined for more than a day after it was found; defendant waived this alleged error by not objecting to it at trial, and we find that these comments did not constitute plain error because this suggestion was vague, there was substantial evidence of defendant's guilt,

and the trial court told the jury that closing arguments are not evidence.)

According to defendant, because no evidence at trial supported the prosecutor's proposed reasons for the prosecution's failure to introduce fingerprint evidence (it can be difficult to raise a fingerprint, and sometimes a person does not leave fingerprints), these comments were improper. In opposition, the State says these comments were fair response to two of the defense's arguments in closing: that the police should have looked for fingerprints at Croft's house and their failure to do so showed how they rushed to close this case of black boys killing a black girl as soon as defendant confessed; and that the jury should not convict defendant in the absence of physical evidence linking him to the murder.

Defendant is correct; the comments regarding reasons for the absence of fingerprint evidence were blatantly improper. However, the statement regarding defendant's failure to present a witness to testify to the process of raising a fingerprint was not error. (*See People v. Albanese* (1984), 104 Ill. 2d 504, 522; *People v. Williams* (1968), 40 Ill. 2d 522.) It is a fundamental principle of trial practice that an attorney's argument is to be based on the evidence and reasonable inferences drawn from the evidence. (*See People v. Beier* (1963), 29 Ill. 2d 511, 517 (no evidence as to presence or absence of fingerprints on murder weapon, and prosecutor improperly argued that defendant had presence of mind to wipe off fingerprints whereas victim, who defendant contended had fired shots, could not have wiped gun because one shot paralyzed him); *United States ex rel. Shaw v. De Robertis* (7th Cir. 1985), 755 F.2d 1279 (defendant was denied fair trial by prosecutor's telling jurors they could not see police report because it was

hearsay evidence, but if they could they would see truth, for comment insinuated that police report contained facts implicating defendant).) By the time an assistant State's Attorney, sworn to uphold justice for all of society, including a defendant, has reached the stage in his career when he is prosecuting a capital murder case this principle should have become deeply ingrained in his code of trial conduct. Indeed, we expect jurors to follow a judge's instruction, possibly given only once during trial, that what attorneys say during argument is not evidence and that their verdict should rest on their own understanding of the evidence. We cannot expect less of prosecutors than that they abide by such a fundamental principle. Here the assistant State's Attorney, by ignoring this principle, created a risk that the jurors would be misled and confused and, because he appeared to have knowledge of fingerprint evidence superior to their own, would consider as evidence the reasons he proposed to explain the lack of fingerprint evidence. Another effect of these comments, as damaging as suggesting reasons fingerprints may not have been found without presenting any evidence of the scientific soundness of these reasons or their application to this case, was their inherent implication that the police in fact looked for fingerprints but did not find any, conduct which was not proved.

Despite the prosecutor's misconduct in making these comments, we do not think they served to deny defendant a fair trial, either alone or in combination with the comments referring to Boyd's thoughts, rights, and family. The trial court sustained defense objections to comments that were improper. Also, the trial court instructed the jurors, prior to closing arguments and at the end of trial, that closing arguments are supposed to be confined to the

evidence and the inferences that can reasonably be drawn from the evidence, and they should disregard statements not so based. These circumstances, along with the substantial evidence of defendant's guilt, lead us to conclude that these improper comments do not warrant reversal of defendant's convictions.

Validity of Defendant's Other Sentences

Defendant's next claim of error relates solely to his aggravated kidnapping conviction. According to defendant, the trial court committed reversible error because the elements of aggravated kidnapping that were included in the instruction to the jury varied from the elements alleged in the indictment. Defendant was indicted for aggravated kidnapping under section 10-2(a)(3) of the Criminal Code of 1961 (Ill. Rev. Stat. 1985, ch. 38, par. 10-2(a)(3)), which provides that a kidnapper is guilty of aggravated kidnapping when he "[i]nflicts great bodily harm or commits another felony upon his victim." The indictment charged defendant under the latter alternative, alleging that he had committed both the felony of murder and the felony of aggravated criminal sexual assault. The fatal error was made, says defendant, when the trial court, instead of instructing the jury on the felony alternative, instructed the jury that one who kidnaps another commits aggravated kidnapping if he "[i]nflicts great bodily harm upon the victim." As a result, defendant contends he was unconstitutionally convicted of an offense different from the one for which he was indicted. (*See United States v. Miller* (1985), 471 U.S. 130, 85 L. Ed. 2d 99, 105 S. Ct. 1811; *Stirone v. United States* (1960), 361 U.S. 212, 4 L. Ed. 2d 252, 80 S. Ct. 270; U.S. Const., amend. V ("No person shall be held to answer for * * * [an] infamous

crime, unless on [an] * * * indictment of a Grand Jury").) Defendant raises a claim under Federal constitutional law only. Because defendant's constitutional rights are at issue, we consider this argument despite his failure to object to the jury instruction (107 Ill. 2d R. 615(a)).

The leading cases upon which we must rest our decision are *Miller* and *Stirone.* In *Stirone,* the Supreme Court held that the defendant's substantial right to have a grand jury, a group of fellow citizens independent of a judge or prosecutor, enter charges against him was denied when the trial court effectively amended the indictment so as to allow the petit jury to consider whether the defendant violated the law under a theory different from the theory set forth in the indictment. The defendant had been indicted for unlawfully interfering with interstate commerce, specifically, interstate shipments of sand used to construct a steel mill. But at trial evidence was admitted concerning whether the defendant's conduct had also interfered with prospective interstate shipments of steel from that mill. More significantly, the trial court instructed the jury that it could convict defendant if it found his conduct interfered with interstate shipments of either sand, as he was charged, or steel. (*Stirone,* 361 U.S. at 213-15, 4 L. Ed. 2d at 254-56, 80 S. Ct. at 271-72.) The Court stated the rule that a defendant cannot be tried on charges different, or at least broader, than those set forth in an indictment, and found that this rule had been violated because the trial court had, in effect, amended the indictment by allowing the jury to consider an additional charge.

Yet, though the Court stated this rule in absolute terms ("[t]he right to have the grand jury make the charge on its own judgment is a substantial right which cannot be

taken away with or without court amendment" (*Stirone,* 361 U.S. at 218-19, 4 L. Ed. 2d at 258, 80 S. Ct. at 274)), in laying out the reasons why the constructive amendment warranted reversal of the conviction, the Court suggested that such an amendment may not invariably warrant reversal. The Court's real concern in *Stirone* did not seem to be that the defendant was tried on a charge not in the indictment, but that he might have been convicted solely on that charge. And, significantly, the Court noted that it was unable to say whether the grand jury would have returned an indictment that included a charge of interference with interstate shipments of steel if such a charge had been presented to it. Therefore, reversal of the conviction seemed to be based not solely on the possibility that the jury convicted the defendant on a charge not set forth in the indictment, but also on the possibility that if this charge had been presented to the grand jury it would have been rejected. (*Stirone,* 361 U.S. at 219, 4 L. Ed. 2d at 258, 80 S. Ct. at 274.) In summary, *Stirone* established that a defendant's fifth amendment rights are violated when a trial court constructively amends an indictment by instructing a jury on a charge not included in the indictment, and thereby broadens the indictment; yet *Stirone* suggested that reversing a conviction is warranted only if the amendment caused prejudice to a defendant because it is not possible to tell, first, whether the conviction rested on the new charge and, second, whether the grand jury would have included the new charge in the indictment if it had been requested to consider it.

The kinds of changes a court can make in an indictment without their being considered impermissible amendments were made clearer in *Miller.* The issue in *Miller* was whether a variance between the indictment,

which charged three counts of mail fraud, and the proof at trial, which related to only two of the three counts, was significant enough to constitute a constructive amendment of the indictment. On appeal, the defendant, who was convicted on the two counts, argued that in presenting proof only as to two of three counts the State had tried him for a fraudulent scheme significantly narrower than the scheme charged by the grand jury. Trying him on the narrower charges, defendant argued, denied him his right to be tried only on charges entered by a grand jury. Fortifying his argument, defendant claimed that if the grand jury had been presented with the narrower fraudulent scheme, it might have been unwilling or unable to indict him. Unanimously rejecting these arguments, the Court held that a variance that merely narrows charges set forth in an indictment does not constitute an impermissible amendment because the defendant is still tried on charges included in the indictment.

Before reaching this conclusion, the Court reviewed both *Stirone* and *In re Bain* (1887), 121 U.S. 1, 30 L.Ed. 849, 7 S. Ct. 781, the case that first declared the rule that a trial court cannot alter the charging part of an indictment, even to narrow it, because it cannot be determined whether a grand jury would have returned an altered indictment. (*Miller,* 471 U.S. at 138-44, 85 L. Ed. 2d at 106-10, 105 S. Ct. at 1816-19.) The *Miller* Court distinguished *Stirone* by the fact that there the proof at trial and jury instructions had broadened the indictment by adding a charge, while in *Miller* the indictment had been narrowed by the lack of proof as to one of three charges. The *Miller* Court then explained that there had been two holdings in *Bain,* one specific and one general. The Court

explicitly rejected *Bain*'s specific holding that "a narrowing of the indictment constitutes an amendment that renders the indictment void." (*Miller,* 471 U.S. at 144, 85 L. Ed. 2d at 110, 105 S. Ct. at 1819.) But the Court reaffirmed "*Bain*'s more general proposition concerning the impermissibility of actual additions to the offenses alleged in an indictment." (*Miller,* 471 U.S. at 144, 85 L. Ed. 2d at 110, 105 S. Ct. at 1819.) In other words, an indictment is impermissibly amended only if it is so altered as to charge a different offense. *Miller,* 471 U.S. at 145, 85 L. Ed. 2d at 110, 105 S. Ct. at 1819.

Not *Stirone, Miller,* nor any other case we have found dealing with constructive amendments of indictments is factually similar to the present case, in which the indictment charged one alternative element of an offense and the jury instructions charged another, apparently by inadvertence. Nonetheless, guided by certain statements made in *Stirone* and *Miller,* we conclude that the trial court's error in instructing the jury did not amount to a constructive amendment of the indictment's aggravated kidnapping charge; defendant's fifth amendment rights were not violated. Although the trial court's instruction to the jury improperly changed an element of the offense of aggravated kidnapping, the effect was to narrow this charge, not to add a charge to the indictment: Whereas the indictment alleged the element of committing a felony (murder and aggravated criminal sexual assault), the jury instruction invoked the alternative element of doing great bodily harm to the victim; obviously, the conduct of doing great bodily harm to a person is inherent within, and narrower than, the conduct of murdering a person. Thus, by substituting a narrower alternative element for a broader element, the trial court improperly altered the

indictment, but it did not impermissibly amend it, requiring reversal of defendant's aggravated kidnapping conviction. This situation is similar to a defendant's being convicted of a lesser included offense, which is permissible. *See People v. Lewis* (1980), 83 Ill. 2d 296, 300.

Our conclusion is further supported by the lack of prejudice the erroneous instruction caused defendant. He was indicted for, prosecuted for, and convicted of the murder of Boyd. Because the same jury that convicted defendant of aggravated kidnapping also convicted him of murder, there is no doubt that, if the jury had been properly instructed that to find him guilty of aggravated kidnapping it had also to find that he had committed a murder, it still would have convicted him of aggravated kidnapping. Defendant does not, and cannot reasonably, argue that the erroneous instruction prejudiced his defense, for he knew he had to defend against a murder charge, and he did so by presenting an alibi, not by claiming that though he had done great bodily harm to Boyd he had not murdered her. In addition, the evidence the prosecution presented was not geared toward proving the narrower element of great bodily harm, but was sufficient to prove murder. Finally, we have no doubt that, if the jury had been presented with the charge that defendant committed aggravated kidnapping using the element of great bodily harm, it would have convicted him, for it found that sufficient evidence existed to support the element, as well as the separate felony, of murder. Therefore, we conclude, pursuant to the reasoning in *Stirone* and *Miller*, that although the trial judge erred by altering the charging terms of the indictment in the present case, because the alteration did not constitute an impermissible amendment of the indictment the trial judge did not commit reversible

error, and defendant's aggravated kidnapping conviction is valid. *See United States v. Kuna* (7th Cir. 1985), 760 F.2d 813, 818 (constructive amendment occurs only when crime charged is " 'materially different or substantially altered at trial, [so that] it is impossible to know whether the grand jury would have indicted for the crime actually proved' " or a " 'complex set of facts' " is presented at trial distinctly different from set of facts in indictment, quoting *United States v. Muelbl* (7th Cir. 1984), 739 F.2d 1175, 1180-81 (also rejects *per se* rule that all judicial amendments are reversible error)); *see also United States v. Thetford* (5th Cir. 1982), 676 F.2d 170 (instructing jury on theory of guilt not in indictment was harmless error because no evidence at trial supported theory and so defendant was not prejudiced); *United States v. Marolda* (9th Cir. 1980), 615 F.2d 867 (jury instruction on definition of offense, which failed to include two elements alleged in indictment, served to amend indictment, and did so in such a way as to warrant reversal of conviction, because those elements were not surplusage, grand jury might not have indicted defendant on narrower charge, and theory of the defense was prejudiced).

Defendant next claims that his conviction for aggravated criminal sexual assault has to be reversed because the language "force or threat of force" in the criminal sexual assault statute (Ill. Rev. Stat. 1985, ch. 38, par. 12-13(a)(1)), and "bodily harm" in the aggravated criminal sexual assault statute (Ill. Rev. Stat. 1985, ch. 38, par. 12-14(a)(2)), is vague and overbroad, thus violating the constitutional guarantee of due process (U.S. Const., amend. XIV). Defendant acknowledges this court's rejection of these identical arguments in *People v. Haywood*

(1987), 118 Ill. 2d 263, yet urges us to reconsider that holding. We will not.

While we will not reverse defendant's conviction for aggravated criminal sexual assault, we will reduce the extended-term sentence of 45 years' imprisonment he received. Aggravated criminal sexual assault is a Class X felony normally punishable by a sentence of from 6 to 30 years' imprisonment; however, if it is "the most serious offense of which the offender was convicted," an extended-term sentence may be imposed. (Ill. Rev. Stat. 1985, ch. 38, pars. 12-14(c), 1005-8-1(a)(3), 1005-8-2(a)(2).) But here murder was the most serious offense of which defendant was convicted. The sentencing judge therefore erred in imposing an extended-term sentence. Accordingly, we modify the sentence to 30 years' imprisonment. *See People v. Whitehead* (1987), 116 Ill. 2d 425, 466.

Death Penalty Sentencing Hearing

Defendant's first challenge to the conduct of the death penalty sentencing hearing is that because the trial judge incorrectly explained the procedure used when a jury decides whether a death sentence should be imposed, he did not knowingly and intelligently waive his right to have a jury at the sentencing hearing. Although "[t]he right to a sentencing jury in a capital case is a statutory, not a constitutional, right" (*People v. Erickson* (1987), 117 Ill. 2d 271, 289), a defendant's waiver of this right has to be knowing and intelligent (*People v. Albanese* (1984), 104 Ill. 2d 504, 535). The error the trial judge made was to tell defendant that, regardless of whether he (the judge) or a jury sentenced defendant, he would make the initial decision on defendant's eligibility for the death penalty,

instead of correctly telling defendant that, if defendant elected to have a jury sentence him, it would be the jury that would have to find, unanimously, that defendant was eligible for the death penalty (Ill. Rev. Stat. 1985, ch. 38, par. 9-1(g)).

Defendant is correct that the trial judge misstated the law when he told defendant, before trial, that, if defendant chose to be sentenced by a jury, the following would occur:

> "If you are found guilty there first has to be a hearing to determine whether or not you are eligible for the Death Penalty. There is [sic] a number of factors that enter into that and it is a decision I make as the Judge. Assuming that you were eligible for the Death Penalty then there has to be a hearing by the same Jury who decided guilt or innocence as to whether or not that penalty is appropriate for you as an individual pertaining to this crime and the other factors that I'm sure you have gone over with your lawyer."

The trial judge further informed defendant he had a right to be sentenced by a jury; if he waived this right the jury would decide only his guilt or innocence and the judge would decide whether he should be sentenced to death. In response to the judge's questions, defendant confirmed a number of times that, after talking with his attorney, he wished to waive his right to be sentenced by a jury; he also signed a written waiver.

Despite the trial judge's misstatement, we find defendant's waiver to have been knowing and intelligent. Defendant's attorney told the judge that he had previously discussed the issue of a sentencing jury with his client (and, just minutes before defendant voiced the waiver, he

and his attorney again discussed it); he also told the judge that defendant had decided to waive a sentencing jury, and he affirmatively answered the judge's question, "[D]o you feel that your client understands sufficiently to make this decision with you?" We have previously held that a waiver of a sentencing jury is knowing and intelligent, even when a trial judge does not inform a defendant of all aspects of having a jury decide the sentence and is alleged to have misstated the law, if the record shows the defendant consulted with his attorney, the defendant said he understood the consequences of waiver, and the defendant's attorney said he thought the defendant's decision was made knowingly and intelligently. (*People v. Guest* (1986), 115 Ill. 2d 72, 107; *People v. Morgan* (1986), 112 Ill. 2d 111, 140-41.) Defendant argues that those cases are inapposite because they involved the effect of a judge's failure to inform a defendant that a jury's sentencing decision would have to be unanimous, not an affirmative misstatement of the law, as is involved here. In our opinion this distinction is irrelevant. The record shows that defendant made the waiver decision after talking with his attorney (there is no doubt in our minds that defendant's attorney was at least competent, and defendant does not claim his attorney misinformed him of the effect of a waiver) and before talking to the judge; so defendant's waiver decision was not based, even in part, on the judge's misstatement of law.

Additionally, defendant argues that his waiver was not knowing and intelligent because the trial judge did not tell him that a jury's decision to sentence him to death would have to be unanimous, but defendant has not presented any reasons warranting a reconsideration of our

prior holdings that it is not error to fail to so inform a defendant. *E.g., Albanese,* 104 Ill. 2d 504.

Next, defendant earnestly argues that the trial judge wrongly judged the significance of evidence of defendant's "traumatic childhood and turbulent family history" and how "to a substantial extent, he is the involuntary product of an extremely violent and dysfunctional family environment," involuntary because he did not choose his relatives and his upbringing. At the sentencing hearing, defendant introduced the testimony of a social worker, Ms. Dinguss, and a psychosocial evaluation of defendant she had prepared. In brief, this evidence revealed: Defendant, an only child, was raised by his mother, his father having been shot and killed by his mother's uncle before defendant reached his first birthday; this same uncle was shot and killed by his own wife; defendant's grandfather committed suicide; defendant's mother was sexually promiscuous throughout his childhood, a situation he resented, and defendant had been abused by men; his mother had also been molested to some degree by her father and uncle; defendant said his female cousins had molested him; as for defendant's past behavior, he had been involved in gangs, had hit women with his hands and hit the mother of one of his many children with a wrench, and had shot at a woman on a public street. Although defendant had never been physically abused, in Ms. Dinguss' opinion he had been emotionally abused by his mother's conduct and criticism of him, and had suffered some "psychological trauma" from his upbringing in a family situation that was, as a whole, "severely dysfunctional." Ms. Dinguss also stated that, owing to limited information, she was not able to determine the extent of this psychological trauma; yet she concluded that defendant's violent impulses would

escalate unless he received "long-term intensive psychotherapeutic intervention."

Before sentencing defendant, the trial judge stated those facts he had considered and the conclusions he had made about defendant's character as a whole and about defendant's demeanor and motivations on the night of July 12-13, 1986. At this time, the trial judge commented on the evidence defendant submitted about his upbringing and its effect on the type of person he was:

> "[T]here has been testimony from Miss Dinguss relative to the fact that she believes that it was inevitable in the Defendant's life that this act of outrageous violence would occur because of the Defendant's upbringing. A mitigating factor is not that it is inevitable that the Defendant act out his aggressions against people and society, the mitigating factor is that there is some way to rehabilitate and change that and make sure that it will never happen again.
>
> There has been no testimony to that, in fact to the contrary, the testimony has been that the Defendant acts out his violence towards women, the young, the unprotected, he acts out toward them because of the relationship with the family. Whether that is true or whether it is not true it is not a mitigating factor to be determined that the Defendant can be released into society to perform good works, rather it shows me that * * * based on the acts * * * in this case, that the Defendant will act out his aggression violently and outrageously just as was done here."

Defendant argues that these remarks show that the trial judge did not understand that mitigating evidence can include evidence that a defendant was not fully

culpable and responsible for his acts owing to his upbringing and does not encompass only evidence showing a defendant to be a good person who will do good works in the future. Because the evidence of his upbringing lessened his culpability for the horrendous crimes he committed, defendant contends the judge deprived him of a fair and reliable capital sentencing hearing under the eighth amendment (U.S. Const., amend. VIII) when the judge refused to see that this evidence was mitigating in any way, and instead considered it as aggravating solely, reasoning that it showed defendant had a violent nature and failed to show he could ever be rehabilitated so as not to pose a danger to society. As support, defendant contends that the Supreme Court has held that when a sentencer is deciding whether to sentence a defendant to death and is presented with evidence of the defendant's traumatic childhood, the sentencer has to consider it as mitigating. Defendant, not content merely to argue that this judge erred in finding evidence of his upbringing to be aggravating and not mitigating, further asserts that evidence of a defendant's traumatic childhood, during which he suffered emotional abuse, is comparable to evidence of mental illness and, thus, is inherently mitigating and can never be considered aggravating. Defendant believes "[i]f these conditions also make it likely that the defendant may act violently, that is simply not his fault and can't be considered a reason to impose the death penalty upon him."

Despite defendant's attempts to find support for the rule he proposes, he fails to prove that the Court has ever held that a sentencer invariably has to give mitigating weight to evidence of a defendant's troubled childhood and can never assign it aggravating weight. It is true that, in general, "'punishment should be directly related to the

personal culpability of the criminal defendant.'" (*Thompson v. Oklahoma* (1988), 487 U.S. 815, 834, 101 L. Ed. 2d 702, 717, 108 S. Ct. 2687, 2698, quoting *California v. Brown* (1987), 479 U.S. 538, 545, 93 L. Ed. 2d 934, 942, 107 S. Ct. 837, 841.) But the Court's pronouncements about the significance of mitigating evidence introduced by a defendant have declared merely that, when such evidence is relevant, a sentencer can neither refuse to consider it (*Eddings v. Oklahoma* (1982), 455 U.S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869) nor be precluded from considering it (as occurs when a judge instructs a sentencing jury that it can consider only evidence satisfying a limited list of mitigating factors) (*Hitchcock v. Dugger* (1987), 481 U.S. 393, 95 L. Ed. 2d 347, 107 S. Ct. 1821). Defendant endeavors to persuade us that, because the Court has said a sentencer cannot refuse to consider relevant mitigating evidence presented by a defendant, it has held that a sentencer must give it some mitigating weight. We disagree with the conclusion. The Court has held only that when the sentencer is a judge, the sentencer cannot refuse to hear evidence introduced as mitigating, and cannot refuse to consider whether that evidence is in fact mitigating on the basis that the sentencing judge believes the evidence is barred by law from being considered as mitigating. This was the case in *Eddings*: The sentencing judge believed that he could not consider evidence of defendant's troubled youth, during which he had little parental supervision and was severely beaten by his father, causing defendant to become emotionally disturbed, slightly retarded, and sociopathic, because it did not fall under any of the mitigating factors listed in the statute. The Court elucidated the sentencing judge's error: "[I]t is clear that the trial judge did not evaluate the evidence in mitigation and find it wanting as a matter of

fact; rather he found that *as a matter of law* he was unable even to consider the evidence." (Emphasis in original.) *Eddings,* 455 U.S. at 113, 71 L. Ed. 2d at 10, 102 S. Ct. at 876.

Contrary to defendant's argument, the Court has indicated that evidence of an upbringing which has caused a defendant to become violent and aggressive can be considered in aggravation, for one duty a sentencer has is to predict a defendant's future behavior based on his past behavior. (*Skipper v. South Carolina* (1986), 476 U.S. 1, 5, 90 L. Ed. 2d 1, 7, 106 S. Ct. 1669, 1671.) In *Burger v. Kemp* (1987), 483 U.S. 776, 793-94, 97 L. Ed. 2d 638, 656-57, 107 S. Ct. 3114, 3125-26, the Court held that defense counsel had not acted ineffectively by failing to introduce evidence of the defendant's troubled background at the sentencing hearing; while the sentencing jury might have been sympathetic, it also might have thought the defendant was nonetheless responsible for the criminal conduct engendered by his violent nature and that his violent nature made him a danger to society –"'"mitigation * * *, after all, [m]ay be in the eye of the beholder [citations]."'"

Defendant is also mistaken about the holding in *Penry v. Lynaugh* (1989), 492 U.S. 302, 106 L. Ed. 2d 256, 109 S. Ct. 2934. *Penry* did not hold that a sentencer has to consider evidence of a troubled childhood in mitigation because it always reduces a defendant's culpability, and that it is improper to consider such evidence's aggravating implication that a defendant may be dangerous in the future. In *Penry,* there was evidence that the defendant was moderately retarded and unable to learn from his mistakes, and, as a child, had been beaten about the head by his mother. Although the trial judge admitted this evidence, the judge did not instruct the sentencing jury

that it might be considered as mitigating. Rather, the jury was instructed that, before deciding whether to sentence the defendant to death, it had to answer three questions affirmatively, as required by the Texas death penalty statute; while no question asked about mitigation, in arriving at an affirmative answer to one question, whether the defendant would be a continuing threat to society, the jury might have actually assigned a negative value to the evidence of defendant's retardation and upbringing. The Court held that the trial judge had erred by failing to instruct the jury that, besides answering these three questions, it could give effect to any mitigating value possessed by the evidence of defendant's background. Even so, in characterizing this evidence the court recognized that "Penry's mental retardation and history of abuse is thus a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." (*Penry,* 492 U.S. at 308-09, 320, 324, 328, 106 L. Ed. 2d at 271-72, 279, 281-82, 284, 109 S. Ct. at 2941-42, 2947, 2949, 2952.) The Court did not state either that this evidence was inherently mitigating and the sentencer was required to consider it as such, or that it would be improper to consider this evidence in aggravation as it indicated the defendant had an unrehabilitable violent nature. Rather, the error was that the jury instructions allowed the jury to consider only one edge of this two-edged sword.

Analyzing the quoted comments of the trial judge in the present case, along with other comments he made before sentencing defendant, we conclude that the judge acted within his discretion in finding that the evidence of defendant's family history was not such that it mitigated

his conduct in raping and murdering Boyd. (*See People v. Christiansen* (1987), 116 Ill. 2d 96, 122 (supreme court will not lightly overturn trial court's findings made during aggravation and mitigation phase of death penalty hearing).) As a whole, the trial judge's comments reveal that he saw defendant as a young man who had coldly, and over the course of several hours, committed these horrendous acts, which were typical of his violent nature toward young women, and who could not be rehabilitated and so would remain a dangerous and violent person. The trial judge believed defendant deserved to be sentenced to death. The quoted comments do not show that the trial judge believed he was somehow precluded from viewing the evidence of defendant's background as mitigating; rather, the trial judge admitted this evidence, considered what it revealed about defendant, and concluded that it simply had no mitigating value but was actually aggravating. As we explained, the Court has never held that a sentencer is required to give mitigating weight to such evidence, and we find that the trial judge did not err in his evaluation of this evidence.

Nor do we find that our death penalty statute causes the death penalty to be imposed in an arbitrary and capricious manner because it gives the sentencer discretion to decide whether a factor such as a defendant's upbringing, which is not statutorily designated as aggravating or mitigating, militates for or against imposing death. Our procedure contains adequate guidelines to ensure that the penalty of death is imposed on only a narrow class of murderers while still allowing for consideration of an individual defendant and his criminal conduct. *See Proffitt v. Florida* (1976), 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960.

In addition to challenging the sentencing judge's assessment of the evidence of defendant's upbringing and family environment, defendant challenges his trial counsel's failure to request the court to appoint a psychiatrist to further evaluate defendant. According to defendant, the information in the psychosocial evaluation prepared by Ms. Dinguss, who was only a social worker with a master's degree in social work and not a psychiatrist or psychologist, was such that his trial counsel should have sought a "full psychiatric workup"; by failing to do so his trial counsel was ineffective and deprived defendant of his sixth amendment right to effective counsel (*Strickland v. Washington* (1984), 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052).

As well as being based upon Ms. Dinguss' professional status, this claim is also based upon the statements in Ms. Dinguss' report that, while defendant's relationship with his mother seems to have been "the catalyst which escalated the defendant's anger toward women in general but specifically his mother," "a thorough psychiatric work-up would need to be conducted before any definitive statements could be made in this regard," and Ms. Dinguss found it "impossible to determine precisely with this limited amount of information" the extent of the "psychological trauma" defendant suffered as a result of his upbringing. Defendant's appellate counsel argued this claim of ineffective trial counsel to the trial judge, and also moved post-trial for the appointment of a psychiatrist; as support, counsel presented a letter from a psychiatrist expressing surprise that certain tests and investigations had not been performed before defendant was sentenced. But, in deciding whether trial counsel acted ineffectively in failing to request appointment of a psychiatrist, the

only relevant information is that which was available to trial counsel; therefore, we look only at Ms. Dinguss' psychosocial evaluation and testimony, not the subsequent letter of a psychiatrist who was never qualified as an expert.

In *Strickland,* the Supreme Court stated that in analyzing a claim of ineffective assistance of counsel "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," a presumption that a defendant has to overcome. (*Strickland,* 466 U.S. at 689, 80 L. Ed. 2d at 694, 104 S. Ct. at 2065.) Further, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." (*Strickland,* 466 U.S. at 688, 80 L. Ed. 2d at 694, 104 S. Ct. at 2065.) In the present case, defendant's trial counsel acted reasonably and effectively in requesting a psychosocial evaluation from the social services department and relying on that report alone, because counsel was merely developing mitigating evidence of defendant's troubled upbringing and family life and their effect on his outlook and attitudes in order to provide at least a partial explanation for why he had committed these horrendous crimes; this report adequately documented defendant's upbringing and its possible effect on him given the inexactitude of psychiatry. Trial counsel was not attempting to establish that defendant suffered from mental illness or insanity at the time of the offense or the trial, or that defendant had some other legal excuse; and there was no evidence during the guilt-innocence or the sentencing phase of the trial that defendant had shown signs of mental illness or psychiatric instability at any time during his life. Given the parameters of counsel's objective in securing the social services

report, it was completely reasonable that counsel did not seek appointment of a psychiatrist in order to "precisely" determine the extent of the "psychological trauma" defendant had suffered while growing up (assuming precision is attainable in the field of psychiatry).

The two cases cited by defendant to support his claim only confirm our conclusion. In *Ake v. Oklahoma* (1985), 470 U.S. 68, 84 L. Ed. 2d 53, 105 S. Ct. 1087, the Court held that an indigent defendant who shows that his sanity at the time of the offense is likely to be a significant issue at trial has a constitutional right to the assistance of a competent psychiatrist; psychiatric assistance is not constitutionally mandated in every case. Any significance *Ake* may have to the current issue, whether defense counsel is ineffective for failing to request appointment of a psychiatrist to further develop mitigating evidence of an indigent defendant's troubled upbringing, is clearly unfavorable to defendant's position for he makes no claim that he was mentally ill or insane at any time. Nor is defendant's argument strengthened by this court's decision in *People v. Stewart* (1984), 101 Ill. 2d 470. In *Stewart,* this court acknowledged that there are valid reasons for mental examinations in some cases, such as showing that a defendant acted under extreme mental disturbance, that there are mitigating aspects of a defendant's character or personality, and that a defendant has rehabilitative potential. But while these are "valid reasons to conduct a mental examination, there must be, in the discretion of the judge, some indication that evidence of these mitigating factors and rehabilitative potential might be present" before an examination will be ordered. (*Stewart,* 101 Ill. 2d at 490.) Because the defendant in *Stewart* had not put his mental condition in issue, and even his own witnesses had

not indicated that he had ever had any mental problems, this court held that the trial court did not err in denying his request for a mental examination. As in *Stewart,* in our case defendant has not claimed or "presented any evidence to demonstrate that his mental condition was abnormal at any time." (*Stewart,* 101 Ill. 2d at 490).

In *Stewart,* we also distinguished two other cases relied upon by defendant here; in *People v. Gleckler* (1980), 82 Ill. 2d 145, a defense of compulsion was raised, and in *People v. Carlson* (1980), 79 Ill. 2d 564, a defense of insanity was raised. In those cases psychiatric evidence had great value because the mental condition of the defendants was directly at issue. The value psychiatric evidence would have had in the present case is comparatively low: defendant never put his mental condition in issue and merely contends that if there had been an expert psychiatric examination, in addition to the social services evaluation, it might have produced additional mitigating evidence by developing a clearer picture of the effect his upbringing had on his character and his capacity to commit these crimes. We refuse to conclude that defendant's trial counsel was ineffective because he failed to request this additional examination at the sentencing stage of the trial when defendant's mental condition was not at issue and when we can only speculate that such an examination would have developed evidence of any mitigating value beyond that which had already been developed in Ms. Dinguss' report, much less of such significant value as to have affected the judge's sentencing decision.

Remaining Issues

Defendant asks us to spare his life. Defendant believes that justice will be served if he is given a lengthy prison sentence. He firmly believes that a death sentence for his crimes is excessive in view of his youth, his upbringing (which he describes as "extremely violent and sexually perverted"), and his one-time expression to a minister of regret for what he had done, an expression made after he had been found guilty, which in the minister's opinion was a true expression of remorse on defendant's part. Yet Ms. Dinguss, the social worker who evaluated defendant, said that he had expressed no remorse to her, and the trial judge found defendant was not remorseful. We have considered the atrocious offenses defendant committed, the circumstances and reasons for those offenses, and all the evidence produced in mitigation and aggravation; without detailing all of that evidence here, we conclude that the death sentence imposed on defendant is appropriate and is not excessive, and we will not vacate it on these grounds.

Finally, defendant raises four grounds upon which he believes the Illinois death penalty statute (Ill. Rev. Stat. 1985, ch. 38, par. 9-1) violates the eighth and fourteenth amendments (U.S. Const., amends. VIII, XIV). On numerous occasions we have rejected the same arguments, and defendant has failed to persuade us that we should do otherwise in this case. Although the statute places a burden of persuasion on a defendant to show the sentencer that a death sentence should not be imposed, this burden of persuasion is not unconstitutional. (*People v. Bean* (1990), 137 Ill. 2d 65, 138; *People v. Whitehead* (1987), 116 Ill. 2d 425.) The statute is not unconstitutional because it fails to impose on the prosecution a burden of proving

beyond a reasonable doubt that there are no mitigating factors sufficient to preclude the imposition of a death sentence. (*E.g., People v. Free* (1983), 94 Ill. 2d 378.) The statute is not unconstitutional because various aspects of it which defendant cites, and which individually have been found to be constitutional, in combination result in the arbitrary and capricious imposition of the death penalty. (*Bean,* 137 Ill. 2d at 141.) The statute is not unconstitutional because it gives prosecutors unguided discretion to decide both whether to prosecute a capital charge and to decide, after a conviction, whether to seek the death penalty. (*E.g., People v. Terrell* (1989), 132 Ill. 2d 178.) As to all four of these constitutional challenges to the statute, *see Bean,* 137 Ill. 2d at 137-41, where the defendant presented virtually identical arguments and where we more fully explained our reasons for rejecting these arguments.

CONCLUSION

For the reasons set forth above, we affirm defendant's convictions and sentences of death and imprisonment, except that we modify his sentence of imprisonment for aggravated criminal sexual assault, reducing it to a term of 30 years. We direct the clerk of this court to enter an order setting Wednesday, January 16, 1991, as the date on which the sentence of death entered by the circuit court of Cook County is to be carried out. Defendant is to be executed by lethal injection in the manner provided by section 119-5 of the Code of Criminal Procedure of 1963 (Ill. Rev. Stat. 1985, ch. 38, par.119-5). The clerk of this court is to send a certified copy of this mandate to the

Director of Corrections, to the warden of Stateville Correctional Center, and to the warden of the institution where defendant is confined.

Judgment affirmed, as modified.

DISSENT BY: CLARK

DISSENT: Justice CLARK, dissenting:

Because I believe the numerous errors committed at defendant's trial unconstitutionally deprived him of his right to due process, I respectfully dissent from the majority's decision to affirm defendant's conviction. Even if I were to agree that these errors did not deprive defendant of his right to a fair trial, because I believe defendant did not knowingly and intelligently waive his right to a jury during sentencing, and because the trial court may have failed to consider defendant's evidence of mitigating circumstances, I would vacate the death sentence and remand for a new sentencing hearing.

Initially I note that the majority relies on this court's opinion in *People v. Bean* (1990), 137 Ill. 2d 65, 78-79, for its finding that defendant's rights were not violated by his absence while the judge questioned two sworn and one prospective juror. (142 Ill. 2d at 291-92.) While I dissented in *Bean* I recognize that it is now the law in Illinois, and is properly applied in this case. I also note that the defendant in *Bean* was absent during the questioning of a prospective juror who was dismissed through the use of a peremptory challenge. In this case, all the jurors questioned outside the presence of the defendant were dismissed for cause. Thus defendant's presence during the questioning would not have affected the court's decision to dismiss the jurors.

As the majority recognizes, numerous evidentiary errors were made at defendant's trial. For example, the majority finds that certain statements relating to defendant's intent to commit an unrelated crime should have been redacted from defendant's confession before it was read to the jury (142 Ill. 2d at 305-09); that the State improperly asked questions formulated to elicit testimony of a prior consistent statement from one of the State's key witnesses (142 Ill. 2d at 309-13); that the prosecutor made numerous improper statements in his closing argument intended to "inflame the jurors' emotions and engender feelings of sympathy for [the victim] and her family, causing some prejudice to defendant" (142 Ill. 2d at 322); and that the prosecutor made improper statements regarding the absence of fingerprint evidence which would tie defendant to the crime (142 Ill. 2d at 323-24).

In considering each of these errors individually, the majority concludes that none of them warrant reversal. The majority's basis for this conclusion is that some of the errors made at trial were waived by defendant's failure to raise them in his post-trial motion, and others were harmless due to the overwhelming evidence of defendant's guilt. I agree that when considered individually, none of the errors warrant reversal. However, I believe that the cumulative effect of these errors has deprived defendant of his constitutional right to a fair trial.

This court has frequently reversed convictions and sentences where there were errors which cumulatively served to deprive the defendant of due process. (*See, e.g., People v. Walker* (1982), 91 Ill. 2d 502, 516-17; *People v. Whitlow* (1982), 89 Ill. 2d 322, 341-42; *People v. Romero* (1967), 36 Ill. 2d 315, 319-20.) Because I believe that the cumulative effect of the numerous errors cited above have

deprived defendant of a fair trial, I would reverse defendant's conviction.

Even if the numerous errors committed at trial did not deprive defendant of his constitutional right to a fair trial, I believe that his death sentence must be vacated because defendant did not make a knowing and intelligent waiver of his right to a jury for his sentencing. As the majority notes, prior to trial, the trial judge misstated the law regarding who would determine defendant's eligibility for the death penalty. (142 Ill. 2d at 333-35.) Specifically the trial judge stated, "If you are found guilty there first has to be a hearing to determine whether or not you are eligible for the Death Penalty. *There is [sic] a number of factors that enter into that and it is a decision I make as the Judge.*" (Emphasis added.) 142 Ill. 2d at 333-34.

Despite this misstatement, the majority finds that defendant's jury waiver was made knowingly and intelligently. The majority relies on this court's opinions in *People v. Guest* (1986), 115 Ill. 2d 72; and *People v. Morgan* (1986), 112 Ill. 2d 111, which state that a jury waiver is not invalid merely because the trial judge did not inform the defendant that a jury's sentencing decision must be unanimous. (142 Ill. 2d at 334-35. *See* also *People v. Albanese* (1984), 104 Ill. 2d 504, 535-36 (where this court held that the Constitution does not require that the trial court inform the defendant of the unanimity requirement).) The cases cited by the majority stand for the proposition that a trial court's failure to inform the defendant of the need for juror unanimity, which is not a constitutional requirement, can be overcome by a showing that the defendant consulted with his attorney, that the defendant said he understands the consequences of waiving the jury, and that defendant's attorney said he believes the

defendant's waiver was made knowingly and intelligently. (142 Ill. 2d at 334-35.) Because the majority finds these factors to exist in the present case, it concludes that defendant's jury waiver was made knowingly and intelligently. 142 Ill. 2d at 334-35.

The majority's reliance on *Guest* and *Morgan* is misplaced. This court has previously held "the sixth amendment requires no precise formula for determining whether a waiver has been knowingly and intelligently made. Each case will turn on its own facts and circumstances." (*People v. Albanese* (1984), 104 Ill. 2d 504, 535-36.) The test applied by the majority has, until now, only been applied to a court's failure to inform a defendant of the need for unanimity among jurors. Clearly there is a difference, which the majority ignores, between an omission of information not required under the Constitution (*i.e.*, the unanimity requirement) and inclusion of information which might mislead the defendant (*i.e.*, who will decide defendant's eligibility for the death penalty). Nonetheless, in its holding the majority implies that any time the factors enumerated in *Guest* and *Morgan* are present, a defendant's jury waiver will be valid, even when the judge misstates the law. The majority thereby creates a standard test to determine if a defendant's jury waiver was made knowingly and intelligently. Such a holding comes dangerously close to prescribing an impermissible formula for a knowing and intelligent jury waiver.

Reviewing the facts of the instant case, I cannot agree with the majority's conclusion that the judge's misstatement of the law played no part in defendant's decision to waive his right to a jury at the sentencing hearing. (142 Ill. 2d at 335.) The majority points to nothing in the record which indicates the judge cured this error, nor does the

majority consider the fact that defendant's attorney consultations occurred *after* the trial judge made the misstatements of the law. It is certainly plausible that during consultations with his attorney, defendant still harbored a misunderstanding of the law which was brought about by the judge's error. Because it is impossible for me to conclude that the judge's misstatement played no role in defendant's decision to waive his right to a jury, I would hold the jury waiver invalid.

In addition to the invalid jury waiver, I believe the trial court may have misunderstood the law regarding mitigation evidence which defendant presented during the sentencing hearing. Ms. Dinguss, a social worker who prepared a psychosocial evaluation of defendant, testified about defendant's traumatic childhood. As the majority noted, this testimony showed:

> "Defendant, an only child, was raised by his mother, his father having been shot and killed by his mother's uncle before defendant reached his first birthday; this same uncle was shot and killed by his own wife; defendant's grandfather committed suicide; defendant's mother was sexually promiscuous throughout his childhood, a situation he resented, and defendant had been abused by men; his mother had also been molested to some degree by her father and uncle; defendant said his female cousins had molested him * * * ." (142 Ill. 2d at 335-36.)

Based on these factors, Ms. Dinguss concluded that defendant was "severely dysfunctional" and would continue to have violent impulses "unless he received 'long-term intensive psychotherapeutic intervention.'" 142 Ill. 2d at 336.

Before he imposed the death penalty, the trial judge referred to Ms. Dinguss' testimony and stated:

> "[T]here has been testimony from Miss Dinguss relative to the fact that she believes that it was inevitable in the Defendant's life that this act of outrageous violence would occur because of the Defendant's upbringing. *A mitigating factor is not that it is inevitable that the Defendant act out his aggressions against people and society, the mitigating factor is that there is some way to rehabilitate and change that and make sure that it will never happen again.*" (Emphasis added.) (142 Ill. 2d at 336.)

I believe the transcript shows the judge may have misunderstood the nature of mitigation evidence. From the above quote, it appears that the judge may have believed that, as a matter of law, evidence of defendant's upbringing could only be a mitigating factor if this evidence shows defendant is capable of rehabilitation. However, there is no such limitation on the type of mitigation evidence which the sentencing court must consider before imposing a death sentence.

The United States Supreme Court has held that in capital cases "the eighth amendment requires that a defendant's punishment be proportional to his personal culpability and blameworthiness." (*People v. Hayes* (1990), 139 Ill. 2d 89, 150, citing *Tison v. Arizona* (1987), 481 U.S. 137, 149, 95 L. Ed. 2d 127, 139, 107 S. Ct. 1676, 1683.) The sentencing body must be permitted to consider any relevant mitigating evidence regarding the defendant's character or background, and the circumstances of the particular case. (*Eddings v. Oklahoma* (1982), 455 U.S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869.) While the United

States Constitution does not dictate the amount of weight the sentencing judge must give to the evidence of mitigation, it does require that all mitigating circumstances be considered before a death sentence is imposed.

In Illinois, "there is no limit on the type or number of mitigating factors [a defendant] can offer." (*People v. Guest* (1986), 115 Ill. 2d 72, 106.) Thus, while rehabilitation is a factor which may be considered, it is not a necessary component for mitigation evidence. Although the trial court is not precluded from imposing a death sentence where mitigating evidence has been introduced, it may do so only after considering all possible mitigating factors. In this case, it is unclear whether the trial court considered defendant's mitigation evidence, but attached little weight to that evidence, or whether the court failed to consider the evidence as a mitigating circumstance due to the lack of potential for rehabilitation. Therefore, I would vacate defendant's death sentence, and remand for a new sentencing hearing.

Justice CALVO joins in this dissent.

APPENDIX E

DEMETRIUS HENDERSON, Petitioner-Appellee, Cross-Appellant, v. JONATHAN R. WALLS, Warden, Respondent-Appellant, Cross-Appellee.

Nos. 00-3834 & 00-3778

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

2002 U.S. App. LEXIS 17848
August 22, 2002, Decided

PRIOR HISTORY:

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 97 C 1079, John A. Nordberg, Judge.

Henderson v. Walls, 296 F.3d 541, 2002 U.S. App. LEXIS 13644 (7th Cir. Ill. 2002)

JUDGES: Before Hon. JOHN L. COFFEY, Circuit Judge, Hon. DIANE P. WOOD, Circuit Judge, Hon. TERRENCE T. EVANS, Circuit Judge.

OPINION: ORDER

On consideration of the petition for rehearing and rehearing en banc filed by counsel for Respondent-Appellant, Cross-Appellee Jonathan R. Walls, all members of the original panel have voted to DENY the petition for rehearing. No judge in regular active service requested a vote on rehearing en banc.

According, IT IS ORDERED that the petition for rehearing be, and the same is hereby, DENIED.